SUPREME COURT, U. S.

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JOHN F. DAVIS, CL

IN THE

Supreme Court of the United States

October Term, 1967

No. 988

MARVIN LUSTIGER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit Judgment Affirming Judgment Of The United States District Court For The District Of Arizona

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit Judgment Affirming Judgment Of The United States District Court For The District of Arizona

---

This is a Petition of MARVIN LUSTIGER for Writ of Certiorari to review the Judgment and Order made by the Court of Appeals for the Ninth Circuit affirming the Judgment against Marvin Lustiger made and entered by the United States District Court for the District of Arizona on June 28, 1965.

A copy of the affirming Judgment and of the Opinion of the Court of Appeals for the Ninth Circuit, which is as yet unreported, are attached (Appendices "A" and "B").

By an order dated December 9, 1967, the time for filing

a Petition for Writ of Certiorari was extended to and including January 5, 1968.

JURISDICTION

The District Court had jurisdiction in this case under Title 18 U.S.C. section 1341.

The Circuit Court had jurisdiction under Title 28 U.S.C. section 1291 and section 1294.

This Court has jurisdiction under Title 28 U.S.C. section 1254(1) to review the judgment in question.

STATEMENT OF THE CASE

The Grand Jury returned a nineteen-count Indictment against petitioner Marvin Lustiger for violations of 18 U.S.C. 1341, between September 7, 1960 and the filing of the Indictment on October 25, 1963. Each count charged petitioner with mailing a letter or other printed matter to a named individual in furtherance of a scheme to defraud. The mailings occurred at various times between February 28, 1961 and April 7, 1963. Counts nine and ten were ultimately dismissed.

A pretrial Motion to Dismiss the Indictment, or alternatively, for Disclosure of the Minutes of the Grand Jury (CT 30-35) was denied (CT 327). Numerous other pretrial motions (CT 36-50, 51-58) were also denied (CT 327).

On June 28, 1965, petitioner was convicted as charged in counts one to eight, inclusive, and counts eleven to nineteen, inclusive, of the Indictment.

In July, 1965, petitioner filed a Motion for Judgment of Acquittal (CT 234-236) and a Motion for New Trial (CT 237-

305, inclusive). These motions were also denied. Thereafter, and on January 24, 1966, petitioner timely filed a Notice of Appeal (CT 317-318).

On November 16, 1967, the Court of Appeals for the Ninth Circuit affirmed the decision of the District Court.

QUESTIONS PRESENTED

1. Whether the evidence was insufficient as a matter of law to sustain a conviction, in that:

A. The Court of Appeals (and the District Court) incorrectly and erroneously interpreted the facts and exhibits contained in the record of this case.

B. The majority of allegedly fraudulent statements attributed to the petitioner were no more than "seller's talk" or "puffing," which is not violative of 18 U.S.C. 1341.

C. The Government failed to prove that anyone was defrauded by the petitioner's alleged fraudulent scheme (and there is a conflict in the Circuits as to whether such proof is necessary to sustain a conviction).

D. The bona fide promise to return money obtained as a result of the alleged misleading advertising constituted a complete defense to the charge of violating 18 U.S.C. 1341.

E. The prosecution failed to overcome the presumption of innocence which surrounds a defendant in every criminal proceeding.

F. The concealments or omissions in advertising attributed to the petitioner were not criminal under 18 U.S.C. 1341, especially since the petitioner was charged, in some instances, with merely not "clearly revealing" certain facts.

2. There is a conflict in several decisions of the various

Circuit Courts of Appeal on the issue of whether evidence of standards of the industry, related values and opinion evidence is admissible in a mail fraud prosecution.

A. Whether, in precluding petitioner from presenting evidence concerning standards of the industry, value and opinion evidence, the court did not in fact prevent the petitioner from presenting a complete defense and thereby denied him due process and equal protections of the law (Fourteenth Amendment, United States Constitution).

3. Whether petitioner was not in fact denied his constitutional right to free speech and free press (First Amendment, United States Constitution) where portions of the advertising material disseminated by petitioner were taken out of context and used to form the allegation that petitioner engaged in a scheme to defraud, where the advertising material, taken as a whole, thoroughly revealed all material facts and negated a scheme to defraud.

A. Whether petitioner was not in fact denied his constitutional right to free speech and free press (First Amendment, United States Constitution) for disseminating advertising materials which did not mislead or deceive a person of average intelligence but which only deceived and misled, if at all, gullible persons of substandard intelligence.

4. The Indictment returned against the petitioner was unconstitutional in that it failed to provide any ascertainable standard of guilt.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The relevant constitutional statutory provisions are printed

in Appendix "C"; they are: Title 18 U.S.C. section 1341; Amendments I, V and XIV to the United States Constitution.

STATEMENT OF FACTS

The Opinion of the Court of Appeals is attached hereto as Appendix "B". No useful purpose would be served in repeating the statement of facts contained in the Opinion of the Court of Appeals. Rather, in the Statement of Facts herein, the petitioner will respectfully bring to the attention of this Honorable Court those areas in which the Court of Appeals seriously misinterpreted the evidence contained in the record. References will be made to page numbers and paragraphs thereon as set forth in the Opinion of the Court of Appeals. The remainder of the facts contained in the Opinion of the Court of Appeals are incorporated herein by reference.

In the third paragraph on page 2 of the Opinion of the Court of Appeals, the court describes the manner in which petitioner subdivided the sections of real estate which were ultimately offered to the public for sale. While the statements contained in this paragraph are basically correct, the Court of Appeals failed to mention and apparently failed to consider the fact that the stipulations entered into between the parties in the trial court indicate that letters were received from two engineering firms employed at different times by petitioner, which letters indicated that petitioner never subdivided or offered to the public any sections of land that were deemed by its engineers to be unsuitable. In fact, this practice was followed even as to portions of the eleven sections that were subdivided and offered to the public for sale.

In the first full paragraph on page 3 of its Opinion, the

Court of Appeals refers to the fact that land which was ultimately subdivided cost petitioner from $33.20 to $125.00 an acre and that this land was sold in 1¼-acre parcels for from $395.00 to $495.00. The court again overlooked the fact that there had been set up a $200,000.00 reserve for improvements, which fact is clearly indicated in the record. The majority of the amounts set up as a reserve for improvements were never spent for that purpose because of the title difficulties which ensued. Of course, the title difficulties were unforeseen at the time the reserve was set up.

In paragraph 3 on page 4 of the Opinion, the court refers to a number of allegedly false statements that were made by petitioner. In fact, such statements as Lake Mead City's proximity to Lake Mead National Recreational area, the proximity of water sports, the presence of a Joshua Tree forest were all facts. Further, the proximity to Kingman, Arizona, is exactly as stated in the brochure and the fact sheet sent by petitioner to prospective purchasers (p. 27 of Exhibit 37 series).

On page 4, paragraph 4, reference is made by the court to the fact that petitioner failed to disclose the fact that alternate even-numbered sections in the Lake Mead City development area were owned by the Federal Government. No proof was ever offered by the Government that the failure to make such a disclosure was material or that the growth of an area would be impeded by the ownership of alternate sections. (In fact, such an arrangement may well be beneficial, as it assures each buyer that every alternate square mile of ground will not be subdivided, will not be built upon and, therefore, will always be available for hunting, hiking and other recreational uses.)

Paragraph 4 on page 4 also refers to the fact that many units have rocky hills and unbridged natural drainage washes. The Court of Appeals failed to indicate that there was never any proof offered, nor was it a fact, that petitioner sold property located on a rocky hill or on an unbridged natural drainage wash. The court also stated that petitioner failed to disclose the fact that only a few units had convenient access. This is simply not true, since the brochure and the fact sheet sent out by petitioner made it clear that there was no present convenient access to the properties. The company did intend to provide access to a given section, although not to any particular lot. Again, the later title difficulties precluded the petitioner from performing this task.

In the fourth paragraph on page 5, the Court of Appeals refers to the fact that "One of the categories of alleged misleading, deceptive and false statements contained in Lustiger's advertising materials relates to the availability of water, both for recreational and domestic uses." This and other statements contained in this paragraph indicate the fact that the Court of Appeals misinterpreted some of the evidence before it. Petitioner's company did and does have rights to the water pipelines and did and does own the two wells located in Lake Mead City. Further, petitioner's company did and does own several springs in Lake Mead City. There never was nor is there now a lack of available water in the area, nor has any resident of Lake Mead City ever gone without water.

Again, in the first full paragraph on page 7, the Court of Appeals misstates the facts concerning the water situation at Lake Mead City. Contrary to the statements made by the Court of Appeals in this paragraph, petitioner's company owned rights in the existing King Tut Water Pipeline and the existing

wells and springs. This fact clearly demonstrates that purchasers of Lake Mead City property would not have to go a distance of 28 miles to obtain water. Perhaps more important was the fact that the company intended drilling wells on each section where construction took place. Again, the title difficulties prevented this from occurring, although one section which was excluded from the title problem did have an additional well drilled upon it. This is the well discussed in the footnote contained on page 7 of the court's Opinion. However, this footnote is partially incorrect for the reason that it states that petitioner's company acquired another well after the indictment was returned. In fact, petitioner's company began its negotiations for the financial arrangements on drilling this particular well before the postal inspector ever made his first appearance, and the well was completed before the indictment was returned.

In the third paragraph on page 7 of the court's Opinion, it is stated that "Customers were not advised that, except in the building area, no street or lot markers existed to enable a purchaser to determine the location of his lot or the boundaries of his road easement." In fact, however, the fact sheet sent out by petitioner stated that there was no such improvement and indicated that Lake Mead City was without present city conveniences, had no streets or utilities, and was a "brand new project" (See Exhibit 37 series). More importantly, the title difficulty which later developed precluded the possibility of such improvements being made. In this regard, it is most important to note that the Government stipulated prior to trial that petitioner was not responsible for the difficulties that arose with respect to the title difficulties and the instant prosecution was not to be based in any way on this difficulty.

On page 8, paragraph 2, the Court of Appeals stated that "The trial court was warranted in finding that the use of the words 'Lake Mead City' in the subdivision name, taken in conjunction with the phrases quoted above were intended to mislead prospective customers into believing that a planned city or community had already been started and was rapidly growing." Again, the Court of Appeals overlooked the fact that a stipulation was entered into between the Government and the petitioner wherein it was agreed that the use of the word "city" in connection with a subdivision did not connote a fraudulent scheme or design.

Paragraph 3, page 8, of the court's Opinion is similarly incorrect. Contrary to the statements made by the Court of Appeals, there were at least two families living in two completed homes before the indictment was returned against petitioner. In this paragraph, the Court of Appeals also indicates that certain improvements were not made by petitioner's company. This again overlooks the fact that the title difficulties prevented such improvements from being made.

REASONS FOR GRANTING THE WRIT

While petitioner considers all questions presented herein substantial, this case is truly unique in that petitioner was convicted of mail fraud for disseminating certain advertising material, which material clearly contained no more than "seller's talk" or "puffing," where the Government failed to prove that anyone was defrauded, and where the petitioner was charged in some instances with merely not "clearly revealing" certain facts. This case also brings before this Court, for resolution, the issue of whether evidence of standards of

the industry, related values and opinion evidence is admissible in a mail fraud prosecution, and whether, in precluding petitioner from presenting such evidence, petitioner was not in fact denied his constitutional right to present a defense. There is also presented to this Court, for resolution, the issue of whether petitioner was denied his First Amendment constitutional rights where portions of the advertising material disseminated by him were taken out of context and used to form the allegation that petitioner engaged in a scheme to defraud, although the advertising material, taken as a whole, thoroughly revealed all material facts and negated a scheme to defraud.

ARGUMENT

1. WHETHER THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN A CONVICTION, IN THAT:

A. The Court Of Appeals (And The District Court) Incorrectly And Erroneously Interpreted The Facts And Exhibits Contained In The Record Of This Case.

The Statement of Facts, *supra,* referred to and incorporated by reference, to a large extent, the facts set forth in the Opinion of the Court of Appeals. There was also included in the Statement of Facts a number of comments wherein petitioner took strong exception to the interpretation of the facts made by the Court of Appeals. These exceptions are incorporated in full and made a part of the Argument at this point. Petitioner respectfully submits that the erroneous interpretation

of the facts made by the Court of Appeals, together with the other issues raised under this Argument, clearly demonstrates that the evidence was insufficient as a matter of law to sustain the conviction. An examination of the indictment and the proof offered at the trial corroborates this conclusion. For convenience, the indictment can be divided into six different classes of alleged misrepresentations or conduct engaged in pursuant to the alleged scheme to defraud. Thus, Paragraphs 2 through 6[1], inclusive, of the indictment may be grouped together for the purpose of discussion, and Paragraphs 7, 8, 9, 10 and 11, respectively, may be discussed separately.

Indictment, Paragraphs 2–6

Paragraphs 2 through 6, inclusive, essentially charged the petitioner with doing the following:

1. Organizing ~~Lake~~ Mead Land & Water Company (hereinafter referred to as "LM") as a corporation, becoming an officer thereof and actively engaging in its business (Paragraph 2).

2. Using Post Office Box 13349, Phoenix, Arizona, as the mailing address for LM (Paragraph 3).

3. Causing LM to enter into contracts to purchase approximately 35,000 acres of unimproved Mojave County land and subdividing some of them (Paragraph 4).

4. Offering for sale to the public parcels within such subdivisions on a deferred-payment plan (Paragraph 5).

5. Entering into contracts with the public for the sale of parcels within such subdivision (Paragraph 6).

It seems clear that none of these statements could conceivably be held to constitute wrongdoing in and of themselves.

---

1 All references are to Count I of the Indictment, since the remaining counts incorporated by reference the salient allegations of Count I.

Only if the alleged fraudulent misrepresentations set forth in the subsequent paragraphs of the indictment were false do the statements in Paragraphs 2 through 6 have any meaning.

Indictment, Paragraph 7

It therefore appears that the alleged false statements contained in Paragraph 7 of the indictment must first be examined. Each alleged false statement contained in Paragraph 7 is discussed below, following a recitation of each such statement.

Paragraph 7, subparagraphs (a), (b), (c), (e), (i), (j), (k), and (q) are as follows:

(a) "Join us for Pleasure and Profit at Lake Mead City, Arizona."

(b) "Lake Mead City . . . . an enchanted city in the making, a truly outstanding New Frontier for wise investors."

(c) "Lake Mead City. Arizona's best located planned community."

(e) "Lake Mead City planning and restrictions assure you of properties that will always be favorably looked upon by discriminating purchasers."

(i) "Seldom, if ever, will you find it possible to purchase so much good land for such a low price."

(j) "You can be a property owner of land that is considered among the finest ever offered for sale in the State of Arizona."

(k) "The best located resort property in the West."

(q) "Arizona's best located, best planned resort area, convenient to both year 'round water sports at Lake Mead and the majestic beauty of the Grand Canyon."

Clearly, all of the foregoing statements represent no more than "seller's talk" or "puffing," which are not made criminal

by 28 U.S.C. 1341. See discussion *infra.* If the statements contained in the subparagraphs set forth above (*e.g.*, "Join us for Pleasure and Profit at Lake Mead City, Arizona") are susceptible of being interpreted as fraudulent misrepresentation, then every seller of goods in America who uses the mails to disseminate his advertising is a criminal.

Subparagraph (d), which states "Invest in this booming area now," can be disposed of summarily. This is not even a representation of fact, but a bare suggestion. It is inconceivable that this statement could be held to be a fraudulent misrepresentation[2].

Subparagraphs (f), (g) and (h) are as follows:

> (f) "Now, for only pennies a day, you can participate in one of the best planned and fastest selling resort areas in Arizona."
>
> (g) "When subdivision takes place, in choice locations such as Lake Mead City, history shows land values rise rapidly."
>
> (h) "When development takes place, such as Lake Mead City, history shows that land values rise rapidly."

If subparagraphs (f), (g) and (h) are not "seller's talk," they come as close as is possible to acquiring that status. In any event, the record does not reflect nor does the Government point to any evidence which refutes the truth of these statements. In fact, with respect to subparagraphs (g) and (h) the Court can take judicial notice of the fact that land values almost always rise when development of raw land occurs.

Although the matter is not extremely free from doubt, it

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2 Parenthetically, subparagraph (a) may, in fact, more resemble subparagraph (d) than it does subparagraphs (b), (c), (e), (i), (j), (k) and (q).

may be that all of the remaining subparagraphs of Paragraph 7 of the indictment could be held to be representations, the falsity of which would expose the petitioner to criminal sanctions. It is submitted, however, that a careful review of the record in this case supports petitioner's contention that none of the statements were false. The remaining subparagraphs of Paragraph 7 are discussed below.

Subparagraph (l) provides:

> "Location more than any other factor determines land values. Lake Mead City enjoys a superb, unique location. Lake Mead City is the only nationally advertised major project of its type, actually starting with the Lake Mead National Recreation Area. Most of the property in this area is Federal Land and is not available at any price. This tends to push prices higher and higher for the choice, privately-owned, deeded properties in Lake Mead City. Get yours now!"

Exhibit 58, Stipulation 18, expressly provided that certain portions of the Lake Mead property were within the boundaries of the Lake Mead National Recreation Area. Subparagraph (l) is, therefore, true.

Subparagraph (m) provides:

> "Most of the region shown on this map consists of Federal Land, and is not available at any price. This makes the choice, privately owned, deeded properties in Lake Mead City all the more valuable, and future price increases seem well-assured."

Again, this statement is not false, since most of the region shown on the map furnished by petitioner to prospective

purchasers was Government-owned land and not available at any price. (Exhibit 24a; Exhibit 23; Stipulation 58, par. 17)

Subparagraph (n) provides:

> "Land values in the Lake Mead City area have increased over 50% in the last few months, as subdivisions have progressed, yet you may still acquire a large estate for cigarette or coffee money. Act now, while you can still buy at original subdivider's prices. Watch land values increase as activity heightens."

With respect to this statement, and assuming most of it is not mere "puffing," three witnesses presented unrefuted testimony that the land values had increased substantially. Thus, one witness testified that his land value increased over 50% (RT 427-428), one testified the increase exceeded 43% (RT 560, 563), and another testified the increase was almost 80% (RT 617). Counsel for petitioner does not recall any testimony introduced by the Government to indicate that the land had not increased in value. If land values did in fact rise, no one was defrauded and there can be no conviction. *United States v. Rabinowitz*, 327 F. 2d 62 (6th Cir. 1964); *Milter v. United States*, 174 Fed. 35 (7th Cir. 1909). In *Milter*, the court stated:

> "It will thus be seen that in all these cases there is present, as a central element of the scheme, intention to defraud the persons addressed, not out of expectations excited (the expectations were the means used only) but out of the money, or a portion thereof, contributed by them to the scheme. In none of these cases is the mere false pretense or false representation, apart from an actual intended deprivation of the person addressed of the money

obtained, held to be an offense under the section in question. In other words, in all of these cases the gist of the offense is the actual or intended injury to the person sought to be reached – fraudulently depriving him of something that he already has – and in none of them is the deprivation of the person addressed of only that which he was led to expect, made the basis of the prosecution.

"Suppose that Mattson and Foster, the persons named in the first two counts, did not get employment, would they be defrauded, provided they got their outlay back? Defrauded of what – of the expected employment? Apart from what was falsely held out to them, they had no claim on such employment. Defrauded of an investment that would pay 20%? Apart from what was falsely held out, they had no claim to such an investment. How can they be said to be deprived of anything that has no existence, except in the false promise itself; and if there has been no intention to deprive, there cannot, within the meaning of this section, be an intention to defraud; *for to be defrauded, the person must be deprived by deceit or artifice of something that he has the right to hold or claim, not in virtue of the deceit or artifice, but as against such deceit or artifice.*" (Emphasis added.) (174 Fed. 35, 39.)

Subparagraph (o) provides:

"Land values in Lake Mead City have increased over 50% in the last few months, as development has progressed, yet you may still acquire a large estate

for cigarette or coffee money. Act now! Watch land values increase as development continues."

It is respectfully submitted that the discussion set forth immediately above relative to subparagraph (n) is equally applicable to subparagraph (o).

Subparagraph (p) provides:

"Thousands of wise investors have already decided that our special offering represents a worthwhile holding, for future profit. Substantial price boosts are indicated as the nation-wide demand increases for this choice private property."

The truth of this statement was conceded by the Government, since, on page 8 of its brief filed in the Court of Appeals, it stated that "By March 10, 1962, approximately 3,000 lots had been sold with 200 having been paid for in full." This statement is also supported by the record. (RT 361, Exhibit 44)

Subparagraphs (r), (s) and (t) provide as follows:

(r) "Less than five miles from the Lake."

(s) "Lake Mead City actually begins less than five miles from the Lake."

(t) "Lake Mead City begins less than five miles from the Lake."

These subparagraphs do not state that all property owned by Lake Mead City was located less than five miles from Lake Mead, but that property begins less than five miles from the lake. Since some of the property was, in fact, located within five miles of the lake, these statements are in no way false. In fact, it was stipulated that, on a straight line basis, the closest of Lake Mead City subdivision units to the nearest place on Lake Mead, accessible by presently existing roads, was approximately four miles, and the farthest was approximately

seventeen miles. (Exhibit 58, Stipulation 22)

Subparagraph (u) provides:

> "Lake Mead City nests in the center of huge recreational developments. Properties are located within a beautiful Joshua tree forest, and in the heart of the Lake Mead National Recreational Area."

The fact that some of the property owned by Lake Mead City was located within the recreational area and all of the property was located very near the recreational area serves to illustrate the fact that this statement was not false. Additionally, the Government's own witness conceded that the Lake Mead City property was located in beautiful country (RT 407).

Subparagraphs (v) and (w) provide as follows:

> (v) "These estates nest in the center of the West's greatest recreational facilities."
>
> (w) "Here is your once-in-a-lifetime opportunity to become a land owner of estate-size property in the heart of one of the West's largest recreational areas."

It seems clear that both of these subparagraphs are mere "puffing." In any event, the use of the absolute superlative in subparagraph (v) was certainly qualified by use of the phrase "one of the West's largest" in subparagraph (w).

Subparagraphs (x), (y), (z) and (aa) provide as follows:

> (x) "County roads have existed in Lake Mead City for several years, and are maintained by the county."
>
> (y) "County roads have existed in Lake Mead City for several years, and are maintained in proper condition at all times."
>
> (z) "Lake Mead City is easily reached, with access via U.S. Highways and County Roads. An airfield and a boat anchorage are nearby."

(aa) "Modern schools, churches and shopping facilities in nearby Kingman, the county seat, and the largest city in northwest Arizona."

None of the foregoing four subparagraphs contain false statements. The evidence showed that the sections of land owned by Lake Mead City are located roughly sixty miles from rapidly expanding Kingman, Arizona (RT 458-459). Further, the property owned by Lake Mead could be reached by utilizing any one of three routes: Highway 93 and the Pierce Ferry Highway; the Hilltop route; and the Hackberry route (RT 393-395; 444-445; 286-288). All of these roads were county-maintained, and since 1958, with the advent of subdivision activity in the area at Lake Mojave Ranchos (RT 448-449; 289-291), Meadview (RT 296-297; 454-455) and at Lake Mead City (RT 294-295), the roads were gradually improved (RT 439-447). In addition to these county-maintained roads, there were numerous ranch roads in these sections (RT 443; 260-261).

Subparagraph (bb) provides:

"All our properties are within the franchised area of Citizens Utilities Company, with regard to power and telephone."

Petitioner's counsel is unable to find any reference in the record which would tend to indicate that the statement contained in this subparagraph is, in fact, false.

Subparagraph (cc) provides:

"IMPORTANT! Plenty of water."

Nowhere in Lake Mead's brochure was it represented that the subdivision had piped-in water. All the brochure said was that water was plentiful, and this was, in fact, true. Exhibit 58, Stipulations 24, 25 and 26 (see also RT 298) clearly demonstrate

that water was available for the Lake Mead subdivision. Exhibit 38a clearly shows that the Clearwater Well is located on Lake Mead's property. It is also important to note that the obtaining of water by having it delivered in a tank truck is, rather than being unusual, the most common method of obtaining water in the Arizona desert areas.

Subparagraphs (dd) and (ee) provide:

> (dd) "All our units have been surveyed, subdivided, platted and recorded. All road easements are provided to assure you of access."
>
> (ee) "All parcels have been platted and recorded, with road easements laid out to assure you of access."

With respect to subparagraph (dd), there is no question that this statement is absolutely precisely correct. All units had been properly surveyed and subdivided and recorded – all in accordance with the Arizona Department of Real Estate and had been approved by them. They were recorded with the Mojave County Recorder (Ex. 26, Ex. 28, Ex. 58, Stipulation 14; RT 370). The word "plat" simply means: "A map, or representation on paper, of a piece of land subdivided into lots, with streets, alleys, etc.; usually drawn to a scale." (Black's Law Dictionary, 4th Edition.) The statement that "All road easements are provided to assure you of access" is also a true statement, since easements were provided although the roads may not yet have been physically placed on the land. The representation was that all parcels had access by way of platted recorded maps. This is confirmed by the statement which is part of subparagraph (ee), "All parcels have been platted and recorded, with road easements laid out to assure you of access."

Indictment, Paragraph 8

Petitioner was also charged with misrepresentations as set forth in Paragraph 8 of the indictment. A thorough review of the record indicates that no misrepresentations were made with respect to the statement set forth in Paragraph 8. The individual subparagraphs of Paragraph 8 are discussed in the following paragraphs.

Paragraph (a) concerns a representation made in one of petitioner's brochures to the effect that the picture contained on page 25 of the brochure was "a photograph of a water pond with the caption 'favorite swimming hole' thereunder." Assuming that such statement could even be the subject of a fraudulent misrepresentation, Exhibit 52 indicates that the company's independent engineer stated that the picture on the top of page 25 "was taken by Mr. Miller and again is a picture of the watering tank at the Diamond Bar Ranch, a watering tank which the ranch foreman's children, to my knowledge, used for swimming." Witness Christianson testified that his children had been in the swimming pool on no less than six occasions (RT 290-291).

Subparagraph (b) charges misrepresentation with respect to "a picture of a house with the caption 'and comfortable ranch house' thereunder, on page 25 of said brochures." The statement made in petitioner's brochure was that a comfortable ranch house existed on Lake Mead's subdivision. In Exhibit 52, the company's independent engineer again corroborates the fact that such a ranch house existed. How or in what manner this is misleading is not indicated by the Government, and the answer is not known to counsel for petitioner.

Subparagraph (c) charges misrepresentation in stating that all of the scenes in the brochures "were . . . photographed

within the boundaries of Lake Mead City . . . a wonderful place to enjoy life." Again, the statement by the company's independent engineer, contained in Exhibit 52, seems to indicate that this statement is true.

Subparagraph (d) incorporates a statement from page 29 of petitioner's brochure: "This brochure contains pictures of portions of booming Arizona, including a large group of actual photographs of scenes at Lake Mead City, and the adjoining Lake Mead National Recreation Area, part of which is included within Lake Mead City." The same statement applicable to subparagraph (c) is applicable to this subparagraph.

Subparagraph (e) contains the alleged misrepresentation: "IMPORTANT! Plenty of water . . ." As indicated above, water was plentiful on the Lake Mead subdivision, and all of the photographs were taken within the boundaries of Lake Mead City. This paragraph, then, forms no basis for an allegation of misrepresentation.

Subparagraph (f) asserts misrepresentation in stating that "Lake Mead City begins less than five miles from the lake." Exhibit 58, Stipulation 22, clearly indicates that certain portions of the Lake Mead subdivision were located approximately four miles from Lake Mead itself.

Subparagraph (g) apparently charges misrepresentation by providing each prospective customer with a vicinity map on which was shown two wells, three springs and a water pipe line. Since each of these items was physically present on the Lake Mead subdivision, it is difficult to understand how or in what manner the map constituted a misrepresentation.

Indictment, Paragraph 9

Very little comment is required with respect to Paragraph

9. Basically, the allegation is that petitioner did not take special care to select choice lots in the area. Yet, the record reflects that such was not the case. Exhibit M indicates that as of August 31, 1963, Lake Mead City had expended $36,552.61 for engineering and development and $263,689.42 for land acquisition.

Indictment, Paragraph 10

Paragraph 10 basically contains allegations that petitioner represented that the land values were increasing, whereas, in fact, they were not. Since this issue has been treated in previous portions of this petition, no further discussion will be undertaken at this time.

Indictment, Paragraph 11

Paragraph 11 of the indictment charges petitioner with "withholding from and not clearly revealing in their advertising" certain material facts. The phrase "not clearly revealing" is very vague and imparts to the petitioner no particular information with respect to the extent to which his conduct was wrongful. Despite this fact, petitioner has attempted, in the following paragraphs, to demonstrate that each of the subparagraphs contained in Paragraph 11 contain truthful statements.

Subparagraph (a) provides:

> "The said Lake Mead subdivision units all are located on odd-numbered sections of land, widely scattered geographically in five different townships, in which townships the even-numbered sections of land are owned by the federal government and subject to use for grazing purposes."

The answer to these allegations is that in the fact sheet forwarded by petitioner to all prospective purchasers (see p. 27 of the Exhibit 37 series), petitioner clearly stated that "Most of the land in this area is owned by the United States Government, and is not for sale, at any price." Further, it is submitted that the Government failed to prove either that revelation of the fact that the Lake Mead City subdivision units were all located on odd-numbered sections of the land was necessary or material or that the fact that property is located on odd-numbered sections of the land is any impediment to the development of such land.

Subparagraph (b) provides:

> "Many of the said Lake Mead City subdivision units have rocky hills and unbridged natural drainage washes thereon."

It is submitted that all of the evidence produced by the Government concerning the mountainous nature of certain portions of Lake Mead City subdivisions (RT 273, 311, 348, 349, 356, 357, 379; Exhibit 60, 60A, 60B) is meaningless when it is remembered that one of the areas of prime concern for the Government (Unit 17-28-60) was set aside as a game refuge (Exhibit 26). Similarly, the Government's evidence about the "big wash" in Unit 7-30-60 (RT 262, 263, 383) was also rendered nugatory, insofar as affording any predicate for a fraud charge is concerned, when it is remembered that the 50-year rain (RT 332) which had so transformed this section (RT 309, 310, 311) occurred in the fall of 1962 (RT 405, 406), not in 1961 (RT 307, 308). By that time, Lake Mead had long ceased selling parcels (RT 367) and no more than its engineers or any Tucson subdivider could it be charged with fraud for having failed to anticipate a 50-year rain. Additionally, while the Government proved that parcels

were sold from this unit, it failed to prove the sale of a single parcel in the "big wash area." The same can be said about all of the Government's testimony about washes and terrains in other subdivision units (RT 380-383, 385-392); in no instance did the Government prove that Lake Mead sold any parcel within the specific area that was described. The engineering evidence that the terrain, as disclosed by field inspections, governed the various parcel sizes (Exhibit 52, 53; see also Exhibit 26) remained uncontradicted.

Subparagraph (c) charged fraud in that petitioner did not clearly reveal that "Only a few of the said Lake Mead City subdivision units are adjacent to existing county-maintained roads and many of said subdivision units are not accessible by ordinary passenger motor vehicle." Again, reference must be made to page 27 of the Exhibit 37 series, which states that the subdivision has "no streets or utilities . . . available." Further, as was indicated in the discussion of subparagraphs (x) and (y) of Paragraph 7, *supra*, roads were available to the Lake Mead subdivision.

Subparagraph (d) provides that:

> "Some of the said Lake Mead City subdivision units are separated from others by a high mountain and deep natural drainage wash."

The discussion hereinabove set forth under subparagraph (b) of this paragraph is applicable to the within subparagraph.

Subparagraph (e) provides:

> "The nearest of said Lake Mead City subdivision units is approximately 23 miles and the farthest of said subdivision units is approximately 38 miles from the nearest existing electric power and telephone lines."

Again, reference must be made to the fact sheet (Ex. 37), which

clearly states that the subdivision was without present city conveniences and that no utilities were available. The fact sheet also clearly states that butane or bottled gas is generally used throughout the area.

Subparagraph (f) provides:

> "Most of the said Lake Mead City subdivision units do not have streets for access to lots, street signs, lot corner markers or lot identification markers provided thereon."

The fact sheet (Exhibit 37) contains revelations with respect to this matter, since the fact sheet clearly states that no streets were available. Further, the discussion hereinabove set forth with respect to subparagraphs (dd) and (ee) of Paragraph 7 of the indictment are applicable here.

Subparagraph (g) provides:

> "The closest of said Lake Mead City subdivision units is approximately 15 miles and the farthest approximately 40 miles from the nearest place on Lake Mead accessible by existing motor vehicle roads or trails."

This allegation seems to be refuted by the language of Stipulation 22, Exhibit 58, which provides:

> "That now and at the time charged in the Indictment, on a straight line, the closest of said Lake Mead City subdivision units, to the nearest place on Lake Mead accessible by presently existing roads was approximately four miles and the farthest approximately seventeen miles."

Of the 20 sections which Lake Mead subdivided, six were accessible by ordinary passenger car, and of the rest all but five were accessible by pick-up, scout or jeep (RT 376-378; 277-279).

Subparagraph (h) provides:

> "Some of the said Lake Mead City subdivision units are approximately 28 miles distant by existing roads and jeep trails from the only assured source of drinking water located in Section 7, Township 30 North, Range 16 West."

Again, the Government assumes that by the representation that water was available, petitioner was stating that piped-in water was available. As has been indicated above, water was plentiful on the Lake Mead subdivision and was available in the manner in which water is usually obtained in desert area lands in Arizona, to wit, delivery by tank truck, from water obtained from wells on the property owned by Lake Mead City.

B. The Majority Of Allegedly Fraudulent Statements Attributed To The Petitioner Were No More Than "Seller's Talk" Or "Puffing," which is Not Violative Of 18 U.S.C. 1341.

Mere "seller's talk" or "puffing" does not subject a person to prosecution for mail fraud. *United States v. Rabinowitz, supra; Harrison v. United States,* 200 F. 2d 662. It is respectfully submitted that, as indicated above, many of the statements made by petitioner were merely "seller's talk" or "puffing." These are not actionable under section 1341. Further, exaggerations in business advertising do not constitute criminal conduct. *Faulkner v. United States,* 157 Fed. 840.

C. The Concealments Or Omissions In Advertising Attributed To The Petitioner Were Not Criminal Under 18 U.S.C. 1341, Especially Since

The Petitioner Was Charged, In Some Instances, With Merely Not "Clearly Revealing" Certain Facts.

In some instances, petitioner was not charged with fraudulent misrepresentation for absolute non-disclosure but, rather, with "not clearly revealing" certain facts. It is respectfully submitted that a prosecution under 18 U.S.C. 1341 cannot be sustained when the defendant is charged with merely not "clearly revealing" certain facts. *United States v. Kram,* 247 F. 2d 830; *United States v. McNamara,* 91 F. 2d 986; *Epstein v. United States,* 174 F. 2d 754; *Stubbs v. United States,* 249 Fed. 571; *Charles v. United States,* 213 Fed. 707; *Williams v. United States,* 278 F. 2d 535; *Haid v. United States,* 157 F. 2d 630; *Gregory v. United States,* 253 F. 2d 104; *Kreuter v. United States,* 218 F. 2d 532; *Linden v. United States,* 254 F. 2d 560; *Silverman v. United States,* 213 F. 2d 405; *Cacy v. United States,* 298 F. 2d 227.

D. The Government Failed To Prove That Anyone Was Defrauded By The Petitioner's Alleged Fraudulent Scheme (And There Is A Conflict In The Circuits As To Whether Such Proof Is Necessary To Sustain A Conviction).

A violation of Title 18, U.S.C. section 1341 requires the finding of (1) scheme to defraud (2) by use of the mails. *Parr v. United States,* 363 U.S. 370, 80 S.Ct. 1171, 4 L.Ed 2d 477. As a conflict exists in the decisions of various circuit courts as to whether the Government must prove as part of its case that someone was defrauded in order to sustain a mail fraud

conviction, this issue should be resolved by this Court. It is respectfully submitted that the better reasoned cases hold that someone must, in fact, be defrauded for a mail fraud violation to be complete. Thus, in *United States v. Brunet,* 227 F. Supp. 766 (W.D. Wisc. 1964), the court stated:

> "In *United States v. Rabinowitz,* 6 Cir., 327 F. 2d 62, at page 76, decided January 22, 1964, the court cited the *Baren* case [*United States v. Baren,* 2 Cir., 305 F. 2d 527] and said as follows:
>
> " 'This was the Government's case. In every mail fraud case there must be a scheme to defraud, representations known by defendants to be false and some person or persons must have been defrauded. * * * The scheme to defraud must have included the intent to do so. Even if the statements complained of were false, defendants must have known them to be false and they must have intended to defraud in order to be found guilty.'
>
> "There are cases which hold that it need not be shown that someone suffered a loss. Indeed, the Standard Instructions in 27 F.R.D., p. 152, section 21.09 . . . [so provides].
>
> "However, the court believes that inasmuch as the *Baren* and the *Rabinowitz* cases, *supra,* are so recent, it is inclined to follow them in this and future cases. . . . " (at p. 772)

Thus, if, as contended by petitioner, the land sold by petitioner was worth an amount equal to or greater than the price paid by the purchaser, the foregoing cases are authority for the proposition that petitioner could not properly be

convicted of mail fraud. It should be noted that several witnesses believed the land purchased by them had substantially risen in value (RT 428, 563, 617).

It should also be noted that even if a purchaser did not get as much value as he was promised, but actually got no less than that for which he paid, there can be no fraud. *Milter v. United States, supra.*

E. The Bona Fide Promise To Return Money Obtained As A Result Of The Alleged Misleading Advertising Constituted A Complete Defense To The Charge Of Violating 18 U.S.C. 1341.

A bona fide promise is present in the instant case (Exhibit F) wherein petitioner agreed to return any money obtained by him as a result of the alleged misleading advertising. Good faith on the part of the defendant is a complete defense to a mail fraud prosecution. *Gold v. United States,* 37 F. 2d 16; *Harris v. United States,* 261 F. 2d 792. See also *Jeffries v. Olsen,* 121 F. Supp. 463; *Walters v. United States,* 256 F. 2d 840. In addition, if a person is a visionary with respect to his plans, and actually believes that his plans will succeed, there can be no violation of section 1341. *United States v. Corlin,* 44 F. Supp. 940. As stated above, a promise to refund the purchase price, made in good faith, negates an attempt to defraud. *Harrison v. United States,* 200 Fed. 662. It is also important to note that the refund offer made in the *Harrison* case is quite similar to the one made by the petitioner in the instant case. The Court's attention is also directed to *Gordon v. United States,* 358 F. 2d 112, which deals with an analogous problem.

F. The Prosecution Failed To Overcome The Presumption Of Innocence Which Surrounds A Defendant In Every Criminal Proceeding.

A necessary correlative of the arguments above raised, that the evidence was insufficient as a matter of law to sustain a conviction, is that the evidence was insufficient as a matter of law to overcome the presumption of innocence which surrounds a defendant in every criminal proceeding. *Fleischman v. United States,* 339 U.S. 349, 70 S.Ct. 739, 94 L. Ed. 906; *Griffin v. California,* 380 U.S. 609, 85 S.Ct. 1229, 14 L. Ed. 2d 1206; *Wilson v. United States,* 149 U.S. 60, 13 S.Ct. 765, 37 L. Ed. 650; *Colt v. United States,* 158 F. 2d 641; *United States v. Bennett,* 152 F. 2d 342; *Boatwright v. United States,* 105 F. 2d 737; *Kaplan v. United States,* 329 F. 2d 561; *State v. Levy,* 113 P.2d 306 (Wash.); *People v. Hill,* 175 P.2d 45 (Cal. App. 1946); *Holland v. Commonwealth,* 55 S.E. 2d 437 (Va.)

2. THERE IS A CONFLICT IN SEVERAL DECISIONS OF THE VARIOUS CIRCUIT COURTS OF APPEAL ON THE ISSUE OF WHETHER EVIDENCE OF STANDARDS OF THE INDUSTRY, RELATED VALUES AND OPINION EVIDENCE IS ADMISSIBLE IN A MAIL FRAUD PROSECUTION.

A. Whether, In Precluding Petitioner From Presenting Evidence Concerning Standards Of The Industry, Value And Opinion Evidence, The Court Did Not In Fact Prevent The Petitioner From Presenting A Complete Defense and Thereby Denied Him Due Process And Equal Protections Of The

Law (Fourteenth Amendment, United States Constitution).

At the trial of the instant case, while the court permitted evidence of value from customer witnesses (RT 428, 506, 553, 562, 617), it excluded evidence of value from Smith, the at-the-moment-and-in-effect complete owner of all of the lands in question (RT 219). The evidence by way of offer of proof was that the land was worth $595.00 per acre in its present condition without roads (RT 221). In addition, the court excluded evidence of the $495.00 sale price (Ex. 5V, 5W, 5X; RT 459-461) for 50' by 112' lots just outside Kingman, Arizona (RT 566). This amounted to approximately $3,960.00 per acre. It is respectfully submitted that the court committed prejudicial error in refusing to admit this evidence. *Farrell v. United States,* 321 F. 2d 409; *United States v. Bloom,* 237 F. 2d 158.

At the trial, the court excluded the compendia of ads and promotional materials of competitive Mojave County and Western subdividers used during the period charged in the indictment (RT 573-575). These consisted of:

Exhibit E: A compendium of ads and promotional materials used at the same time by competitor Mojave County subdividers, to wit, Lake Mojave Ranchos, Lake Mead Ranchos, Meadview, Golden Valley and Paradise Acres, etc. (supplemented by Ex. BB-2 – which, by Ex. BB and Stipulation No. 9, were established as being authentic pictures of Paradise Acres).

Exhibit CC: A collection of Mojave County publications at the same time showing ads of Mojave County competitors of LM.

Exhibit F: A compendium of ads and promotional

materials used, at the same time, by competitor western land subdividers, to wit, Horizon City, Texas, and Rio Grande Estates, New Mexico (as supplemented by Ex. BB-3 – which, by Ex. BB and Stipulation No. 9, were established as being authentic pictures of these subdivisions).

Exhibits B and B-1: The Palm Springs exhibits, the materiality of which was to demonstrate that a checkerboard ownership pattern is no real impediment to the development of a thriving city, and which exhibits indicated that the growth of the City of Palm Springs, California, had been and continues to be tremendous notwithstanding the fact (or perhaps because of the fact) that Palm Springs itself is built on alternate sections of land.

In addition, at the trial, the court also excluded evidence of the small-tract offerings of the Federal Bureau of Land Management in Arizona and California during the same period (RT 572, 575). It cannot be overemphasized that these proffered exhibits consisted of advertising promulgated by a governmental agency under standards which undoubtedly were approved by the United States Government. In light of this fact, it might even be wondered if the United States Government was not estopped to assert that the petitioner engaged in misconduct in his advertising, when the petitioner's advertising went no further than the advertising of the United States Government. The exhibits referred to consisted of:

Exhibit G: A compendium of the offerings of the Bureau of Land Management, a governmental agency, of small tracts in Arizona, and its publicity attendant thereto – as more fully disclosed by Stipulation No. 5, which said

tracts were offered at Apache Junction, Liberty, Yucca, and Snowflake (supplemented by Ex. BB-1 – which, by Ex. BB and Stipulation No. 9, were established as being authentic pictures of the lands covered by these offerings).

Exhibits AA, AA-1, AA-2, AA-3, AA-4 (covered by Stipulation No. 8): A compendium of certain offerings of the aforesaid Bureau of Land Management of small tracts in California, and its publicity attendant thereto, together with concededly authentic pictures of the lands covered by these offerings.

These documents, as to which the government reserved solely an objection as to materiality, were offered:

(a) to establish the standards of the industry of which LM was a member;

(b) on the issue of value; and

(c) to support petitioner's position that the Government had failed to prove bad faith.

Concededly, unless the materials of Mojave County subdivider competitors (Exhibit E) were admissible, the materials of out-of-state competitors were not admissible. Hence, argument here will be confined to what the materials of the Mojave County subdividers proved. As to the Federal Bureau of Land Management offerings and materials, petitioner concedes similarly that if data as to the Arizona small-tract offerings during the period were not admissible, data as to the California small-tract offerings were clearly not admissible. And so, as a predicate for the argument that follows, reference herein is solely to the Federal Bureau of Land Management's small-tract offerings in Arizona and, for brevity, is limited primarily to the Bureau's Apache Junction, Arizona, offering.

Exhibit E demonstrates:

(1) Although every Mojave County subdivision has the same checkerboard pattern as that of LM's subdivision (Exhibit 24A), not one of the competing subdividers – any more than LM – disclosed this in their materials (Ex. E: Lake Mojave Ranchos – Sheets 2, 3, 4, 5 (all on last page), Sheets 6, 8, 9, 12; Lake Mojave Estates - Sheet 18 (back page); Lake Mead Ranchos - Sheet 20 (back page), Sheet 21; Meadview - Sheet 24; Golden Valley - Sheets 31, 36; Paradise Acres - Sheets 37, 38, 39).

(2) These competitors used an imagination in the naming of their subdivisions that far outdid LM's naming of its subdivision. Thus, for example:

(a) "Lake Mojave Ranchos,"

located down the road from LM's subdivision, is a far piece from anywhere near Lake Mojave[3] (although its maps, like those of LM, clearly disclosed the distance).

(b) "Meadview"

has less than 100 "view" lots (RT 514).

(3) All of the competitors display in their materials a flamboyancy that exceeds that of LM's materials. For

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3 The standard text of its ads (Ex. E: Sheets 6, 7, 8, 9) lends support to this imaginative naming of a subdivision:

"Where Are The Lake Mojave Ranchos Located

"Just a short drive from fabulous Las Vegas, Lake Mead and Boulder Dam. Lake Mojave Ranchos are also in close proximity to bustling and rapidly expanding Kingman, Arizona. Lake Mojave is fed by the Colorado River which offers the Southwest one of the finest resorts in the nation. It is 68 miles long and abounds in trout and bass. Lake Mead, Lake Mojave and Lake Havasu are all part of the Colorado River, and are separated by three large dams that supply power for progress in the southwest."

example:

"Consider, then, the fact that Lake Mojave Ranchos is virtually surrounded by Lake Mead Recreational area" (Ex. E: Sheet 1, p. 4; Sheet 2, p. 8).

"If you want to fish . . . it's just minutes away" (Ex. E: Sheet 1, p. 9).

"Here you will find a planned community . . ." (Ex. E: Sheet 21).

" . . . near Las Vegas and Kingman" (Ex. E: Sheet 2, p. 11).

" . . . electric power lines have been constructed to provide power" (Ex. E: Sheet 5, p. 8).

" . . . power lines are being extended" (Ex. E: Sheets 7, 8).

"Lake Mojave Ranchos are a planned development" (Ex. E: Sheet 9).

" . . . nestled in a huge bend of the Colorado River" (Ex. E: Sheet 18).

"Panoramic acre Homesites overlooking fabulous Lake Mead . . . 2 miles from the shore of Lake Mead" (Ex. E: Sheet 23).

"Hurry, only 60 days left to own your 2-½ acres in Golden Valley . . . Prices subject to change as land values rise" (Ex. E: Sheet 31).

(4) The price of land in the nearby competing subdivisions greatly increased during the period charged in the indictment and, in every instance, exceeded LM's price for its acreage ($395 and then $495 per 1-¼ acres, or $316 and then $396 per acre). Thus:

(a) Lake Mojave Ranchos' price was $395

per acre and increased to $895 per acre (Ex. E: Sheets 1-17);

(b) Lake Mojave Estates' price was $495 per acre and increased to $595 per acre (Ex. E: Sheets 18, 19);

(c) Lake Mead Ranchos' price was $695 per acre (Ex. E: Sheet 20);

(d) Meadview's prices started at $795 per acre (Ex. E: Sheets 23-30);

(e) Golden Valley's price was $995 for 2-½ acres (or $398 per acre) and increased to $1,195 for 2-½ acres (or $478 per acre) (Ex. E: Sheets 31, 35);

(f) Paradise Acres' price was $476 per acre (Ex. E: Sheet 38).

Stipulation No. 5, relating to the Federal Bureau of Land Management offerings, establishes that in connection with the U.S. Government Bureau's offering to the public for sale 2-½ or 5-acre tracts it used and distributed the pamphlets that are Sheets 1-4 of Exhibit G. These pamphlets represent that:

(1) Under the Small Tract Act citizens obtain lands "for residences, recreation, or business purposes" (Ex. G: Sheet 1, p. 3).

(2) "Under the small tract law, small parcels of vacant public land may be leased or sold if they are chiefly valuable for residential, recreation, business, or community sites. * * * To qualify as a residential site, land must be suitable for seasonal or year-round use as a home for a family" (Ex. G: Sheet 1, p. 5).

(3) "How much will I have to pay for my small tract? At the time the land is classified, it is appraised at

its fair market value, consistent with other land values for similar lands in the area. The price varies according to the character, location, and desirability of the land. Land near towns or cities is likely to have a higher value than land in more distant and isolated areas. Also, land fronting on roads, streams, or lakes is more valuable than land not having such frontage" (Ex. G: Sheet 1, p. 22).

(4) "The Small Tract Act of 1938 provides a means whereby a person can obtain land for a homesite, business site, or recreation site, if the land is opened by the Bureau. These tracts may be up to five acres in size" (Ex. G: Sheet 4, p. 9).

The United States Government Agency also secured general publicity for its offerings, such as is shown by Sheet 4A of Exhibit G. Note, for example:

> "Per-acre appraisals may range from $100 to more than $1,000 depending on the location of the land and other factors. Land which appeared practically worthless a few years ago, Helmandollar pointed out, has since become valuable for esthetic or other reasons."

The offering circular by which the Apache Junction lands were offered read in part:

> "The center of the Apache Junction Area is at the intersection of the Apache Trail and Highway U.S. 60-70-80-89, and is 32 miles east of Phoenix, Arizona, on the lower southwestern slopes of the Superstition Mountain Range. The population is approximately 8,500 permanent residents. Three water companies service the area, electricity is available in all but the remote portions, and natural

gas is being extended into outlying areas.

"The subject lands are situated on the eastern fringe of the Apache Junction Area and are north of the U.S. Highway 60-70-80-89, and east of the main access road running northerly through the NE ¼ Sec. 35, and they are considered equally desirable and potentially suitable for desert homesite development. The tracts can be identified by finding the brass cap survey markers for the east quarter corner and the west quarter corner of Sec. 36, and by finding the reference corners for the northwest section corner and the north quarter corner of Sec. 36. Electricity is available to this neighborhood from a power line running along the western boundary of Sec. 25 and the NW ¼ Sec. 36. Natural gas and water are available at the Palm Springs development 2-½ miles to the west, and can be extended into these lands as soon as sufficient demand exists. There are no zoning restrictions. The lands are accessible from U.S. Highway 60-70-80-89 by a graded, gravel road leaving this highway 3.5 miles southeast of Apache Junction, thence northeastward to the point of intersection with the north section line of Sec. 35. A recently cleared and graded road runs eastward along the line for ¼ mile to the northwest corner of the land, and continues east along the north side of Sec. 36, giving access to the northern portion of the area. The southern portion is accessible from a point on the U.S. Highway 4.25 miles southeast of Apache Junction, then northerly over unimproved roads and trails into the subject land.

"The topography of the NW ¼, NE ¼, SW ¼ and the N ½ N ½ SE ¼ Sec. 36, is quite flat, with a very gentle slope. Two main and several very small shallow washes traverse the area.

* * *

"The highest and best use for these lands is for desert homesite development.

* * *

"Bids sent by mail will be considered only if received at the Arizona Land Office, Bureau of Land Management, 3022 Federal Building, Phoenix 25, Arizona, prior to 3:00 P.M., March 23, 1962." (Ex. G: Sheet 5)

The publicity release of the U. S. Government Agency, relating to the Apache Junction offering, read:

"Seventy-nine home sites on federal land near Apache Junction will be sold at public auction in Phoenix March 29" (Ex. G: Sheet 8).

The free newspaper publicity attendant upon said sales said:

"Helmandoller said the tracts are potentially suitable for desert homesites. Electricity is available on the neighborhood from a power line along the Apache Trail.

"Natural gas and water is available at Palm Springs subdivision, 2-½ miles to the west. There is no zoning restrictions. All mineral rights are reserved by the government.

"Seventy-nine home sites on federal land near Apache Junction will be sold at public auction in Phoenix March 29, the Bureau of Land Management said yesterday." (Ex. G: Sheet 9)

This type of publicity was sought from a host of Arizona news media (Stip. No. 5, par. H, BB, CC, DD; Ex. G, Sheets 28-31).

None of the parcels were staked and there was neither water nor any other utility services (electricity, gas or telephone) available at or on the boundaries of said parcels[4]. There were no roads, bladed or otherwise, leading to said parcels or the boundaries, except for those shown by a map that was available at the Bureau of Land Management office (Stip. 5, par. L)[5].

The parcels sold for prices ranging from $800.00 to $1,182.00 per acre (Stip. 5, Par. K).

It was shown that the parcels contained washes 15 to 20 feet wide covering an acre of land; and there were gorges in which could be hidden a car (RT 521) and that all of the parcels on the south were mountainous (RT 522).

Purchasers of parcels received patents (Stip. No. 5, Par. M; Ex. G, Sheet 7A) under which the government reserved a 25-foot boundary right-of-way for roadway and public utilities purposes. Since this reservation does not run to the benefit of surrounding parcels, it is obvious that the patent, without more, created land-locked parcels without legal right to access.

Exhibit G thus demonstrates that the government, which is and has been the biggest in the field of sales of unimproved lands (truly the leader of the industry), used (and for free) practically every promotional technique that LM and all others in the field used. Note that the gullible would be bound to

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4 This was true of all of the other Federal Bureau of Land Management offerings in Arizona – at Liberty, Yucca, and Snowflake (Stip. No. 5, Par. Q, V, FF).

5 As to the Snowflake offering, there were no bladed roads at all leading to the tract or its boundaries (Stip. No. 5, Par. FF).

believe that he was buying a "homesite." Note, too, that by the very text of the government's "brochure," the gullible might naturally be led to believe that by virtue of what was said (i.e., "electricity is available"; "natural gas and water are available") and what was not said (i.e., note the absence of indication of whether the tracts are staked and the inference from the reserved right-of-way statements that the roads lead to the individual tracts), he was getting a tract ready for immediate city-like occupancy. Truly, the big difference between the United States Government's offerings and those of LM is that the government demanded cash whereas LM permitted time payments.

The comment by the Court of Appeals concerning the propriety of excluding this evidence is, it is respectfully submitted, patently erroneous, especially insofar as the court concludes that the exclusion of exhibits relating to the Arizona activities of the Federal Bureau of Land Management was proper for the same reason that the exhibits concerning the competing subdividers in Arizona were inadmissible. (Opinion of the Court of Appeals, p. 14).

One of the primary bases for the court concluding that the evidence of the activities of other subdividers was irrelevant was that the fact that these subdividers conducted their activities in a manner similar to Lustiger did not show that Lustiger's activities were proper. The Court of Appeals reasoned that the other subdividers may have been acting illegally also. To apply this same reasoning to the activity of the Bureau of Land Management seems to be unusual, in light of the statement by this Court that:

> " . . . 'Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the

whole people by its example . . ." (*Mapp v. Ohio*, 367 U.S. 643, 659, 81 S.Ct. 1684, 6 L.Ed. 2d 1081, 1092.)

If a private individual patterns his advertising program after a program utilized by the United States Government, it can hardly be reasoned that the activities of the governmental bureau are not admissible because it, too, may have been engaged in fraudulent activities. The question may well be asked: If an individual cannot look to the standards set by the United States Government, who, in fact, can be looked to? It is respectfully submitted that *United States v. Brandt*, 196 F. 2d 653; *United States v. Sprengel*, 103 F. 2d 876; *Silkworth v. United States*, 10 F. 2d 711; *Worthington v. United States*, 64 F. 2d 936; *Hartzell v. United States*, 72 F. 2d 569; *United States v. Shavin*, 287 F. 2d 647; and *Kleeden v. United States*, 45 F. 2d 87, all stand for the proposition that the court committed prejudicial error in refusing to admit the above referred to evidence. It is submitted that the court's act in precluding petitioner from presenting such evidence, in fact, prevented the petitioner from presenting a defense and thereby denied him due process and equal protections of the law, for it is well established that a defendant who is denied the right to present a defense is denied due process of law. *Cf. People v. Marsh*, 58 Cal. 2d 732, 26 Cal. Rptr. 300; *In re Harris*, 76 Cal. 2d 879, 16 Cal. Rptr. 889.

On page 13, footnote 7, of the Opinion of the Court of Appeals there are set forth cases which indicate that there is a conflict in the Circuits concerning the issue of the admissibility of the above-referred to kind of evidence. It is respectfully submitted that this Court should grant certiorari to resolve this conflict.

The court excluded (RT 530) the opinion evidence of the former President of the Arizona League of Land Developers and one of the leading subdividers in Mojave County (RT 447). By stipulation (Stip. No. 3), the authenticity and competency of this opinion was conceded by the Government, with the Government's sole reservation being as to materiality. This opinion was based upon a review of LM's sales and promotional materials in comparison with those of other land sale companies as used during the period charged in the indictment. The opinion was:

> "* * * In my opinion the advertising representations and materials, sales techniques and devices used by Lake Mead Land and Water Company during 1961 and 1962 were well within the range of advertising representations and materials, sales techniques and devices generally and customarily deemed proper during that period, and generally and customarily used during that period by land subdividers who then were and now are considered entirely proper and ethical by the industry itself and the public as a whole * * * " (Exhibit A)

It is respectfully submitted that the court erred in excluding this evidence. *United States v. West Coast News Company,* 228 F. Supp. 171; *Senn v. Lackner,* 91 Ohio App. 83, 100 N.E.2d 419; 100 N.E.2d 432; 105 N.E.2d 49; 107 N.E.2d 588; *Sparkhill Realty Corp. v. State,* 4 N.Y.S.2d 674, 4 N.Y.S.2d 1023, affirmed 279 N.Y. 656, 18 N.E. 2d 301, based on 268 N.Y. 192, 197 N.Y. 192; *Sheldon v. Moredal,* 29 F. Supp. 729; *Rolf v. Bird,* 239 F. 2d 257; *United States v. Wood,* 226 F.2d 924; *Grismore v. Consolidated Products,* 232 Iowa 328, 5 N.W.2d 646.

3. WHETHER PETITIONER WAS NOT IN FACT DENIED HIS CONSTITUTIONAL RIGHT TO FREE SPEECH AND FREE PRESS (FIRST AMENDMENT, UNITED STATES CONSTITUTION) WHERE PORTIONS OF THE ADVERTISING MATERIAL DISSEMINATED BY PETITIONER WERE TAKEN OUT OF CONTEXT AND USED TO FORM THE ALLEGATION THAT PETITIONER ENGAGED IN A SCHEME TO DEFRAUD, WHERE THE ADVERTISING MATERIAL, TAKEN AS A WHOLE, THOROUGHLY REVEALED ALL MATERIAL FACTS AND NEGATED A SCHEME TO DEFRAUD.

A. Whether Petitioner Was Not In Fact Denied His Constitutional Right To Free Speech And Free Press (First Amendment, United States Constitution) For Disseminating Advertising Materials Which Did Not Mislead Or Deceive A Person Of Average Intelligence But Which Only Deceived And Misled, If At All, Gullible Persons Of Substandard Intelligence.

In framing its indictment, the Government took portions of statements contained in petitioner's advertising brochures and, based thereon, alleged a "scheme to defraud." It is submitted that portions of petitioner's advertising cannot be taken out of context and the petitioner charged with a fraudulent scheme based upon such portions alone. The gravamen of the offense of which petitioner was charged was a "scheme to defraud." Surely, the entire advertising brochures, and not just portions thereof taken out of context, must be examined in order to determine whether or not, in fact, a "scheme to defraud" was present. To take a portion of the advertising out

of context violated petitioner's First-Amendment rights (freedom of speech and freedom of the press).

The principle here under discussion exists in other First-Amendment areas, *e.g.*, obscenity. Thus, a book must be read in its entirety to determine whether it is obscene; portions may not be taken out of context. *United States v. One Book Called "Ulysses"*, 5 F. Supp. 182, 185, affirmed 72 F. 2d 705. Further, this Court, in *Roth v. United States* and *Alberts v. California* (decided together) 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498, approved the *"Ulysses"* decision and set forth the constitutionally acceptable definition that the "dominant theme", taken as a whole, must appeal to the prurient interest for a matter to be obscene. See also *A Book Named John Cleland's Memoirs Of A Woman Of Pleasure v. Massachusetts,* 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1; *Ginzberg v. United States,* 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31; *Mishken v. New York,* 383 U.S. 502, 86 S.Ct. 958, 16 L.Ed.2d 56. It is submitted that fraudulent statements, like obscene literature, are not constitutionally protected. But to lose the cloak of constitutional protection, a statement must clearly be fraudulent. It is submitted that the statements attributed to the petitioner herein were not of such a nature that the First Amendment's protections should have been lost. Finally, where First-Amendment protections are involved, there is a presumption that a statute under attack is unconstitutional.

It is further submitted that a thorough examination of the advertising materials sent by petitioner through the mails indicates that, in fact, petitioner made every effort to make full disclosure of all the material facts relative to Lake Mead City. If, in fact, any person was misled or deceived as a result

of this advertising material, surely it could only have been a person who was most gullible and of substandard intelligence. It is petitioner's contention that a person cannot be convicted of a mail fraud violation and branded a felon because advertising material disseminated by him deceives a person of substandard intelligence. If, as is indicated in the Opinion of the Court of Appeals (page 6, footnote 3), a person may be convicted of mail fraud in a situation where a person of average intelligence or above could not possibly have been misled by the material sent through the mail, it is respectfully submitted that such a conviction must be held to violate the defendant's sacred constitutional rights of free speech and free press.

4. THE INDICTMENT RETURNED AGAINST THE PETITIONER WAS UNCONSTITUTIONAL IN THAT IT FAILED TO PROVIDE ANY ASCERTAINABLE STANDARD OF GUILT.

If, as a matter of law, the indictment returned against the petitioner stated an offense under 18 U.S.C. 1341 and a "scheme to defraud" could be found to be present without there having been proved any "actual misrepresentation of fact," that the scheme "succeeded" or that anyone was defrauded or sustained a loss as a result of the scheme, then the indictment provided no ascertainable standard of guilt. This is all the more true when it is considered that the court merely accepted that what was *not* said by the petitioner constituted "concealment" or that most gullible persons would misread what was contained in the material

promulgated by the petitioner and his company[6]. *Giaccio v. Pennsylvania,* 382 U.S. 399, 86 S.Ct. 518, 15 L.Ed.2d 447; *Bouie v. Columbia,* 378 U.S. 47, 84 S.Ct. 1697, 12 L.Ed. 894; *Winters v. United States,* 333 U.S. 507, 68 S.Ct. 665, 92 L. Ed. 840; *Musser v. Utah,* 333 U.S. 95, 68 S.Ct. 397, 92 L.Ed. 562; *Connally v. General Construction Co.,* 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322; *United States v. Cohen Grocery Co.,* 255 U.S. 81, 41 S.Ct. 298, 65 L.Ed. 516; *United States v. DeCadena,* 105 F. Supp. 202.

CONCLUSION

In mail fraud cases, it is clear that where the evidence is as consistent with innocence as it is with guilt; the appellate court must reverse the conviction. *Harris v. United States, supra; Yusem v. United States,* 8 F. 2d 6; *McClintock v. United States,* 6 F. 2d 839. It is also clear that where guilt depends entirely on circumstantial evidence, the proof of guilt must not only be beyond a reasonable doubt, but to the exclusion of every reasonable hypothesis of innocence. *Epstein v. United States, supra.* Fraud is never presumed; rather, it must be proved by clear and satisfactory proof. *St. Clare v.*

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6 At and prior to the time of the indictment returned against the petitioner, extensive congressional hearings were in progress and the Post Office Department pointed with considerable pride to the indictment of the defendant in connection with the Lake Mead project. The publicity that attended the indictment of the defendant can hardly be overemphasized, nor was it possible for that publicity to have not affected the trial judge.

Giles v. Maryland, ___ U.S. ___, ___ S.Ct. ___, 17 L.Ed. 737; *Sheppard v. Maxwell,* 384 U.S.333, 86 S.Ct. 1507, 16 L.Ed.2d 600.

United States, 23 F. 2d 76. Finally, where the sufficiency of the evidence is attacked, the appellate court must conduct a meticulous review of the entire record and all its exhibits. *United States v. Rabinowitz, supra.*

It is respectfully submitted that the Court of Appeals, in affirming petitioner's Judgment of Conviction, failed to follow any of the above set forth rules that have been established for appellate courts in reviewing mail fraud convictions. For this reason, petitioner respectfully submits that a review of the record will indicate that this Petition for Writ of Certiorari should be granted and the Judgment of the Circuit Court, affirming the Judgment of the District Court, should be set aside and the judgment of conviction reversed.

Respectfully submitted,

MARKS & SCHNEIDER

BY: BURTON MARKS

Attorneys for Petitioner

APPENDICES

Appendix "A" –	**Judgment, United States Court of Appeals For the Ninth Circuit.**
Appendix "B" –	**Opinion, United States Court of Appeals For the Ninth Circuit**
Appendix "C" –	**Statutory and Constitutional Provisions Involved**

APPENDIX "A"

Judgment

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARVIN LUSTIGER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 20,967

APPEAL from the United States District Court for the

_____

District of Arizona

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the ____ District of Arizona _____ and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the _____ judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered Nov. 16, 1967

APPENDIX "B"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARVIN LUSTIGER, *Appellant*, vs. UNITED STATES OF AMERICA, *Appellee.*	No. 20,967

[November 16, 1967]

Appeal from the United States District Court for the District of Arizona

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Before: CHAMBERS, HAMLEY and ELY, Circuit Judges

HAMLEY, Circuit Judge:

This is a mail fraud case involving the real estate activities of Marvin Lustiger in Mohave County, Arizona. The grand jury returned a nineteen-count indictment against Lustiger for violations of 18 U.S.C. § 1341 (1964), between September 7, 1960, and the filing of the indictment on October 25, 1963. Each count charged him with mailing a letter or printed matter to a named individual in furtherance of a scheme to defraud such person. The mailings occurred at various times between February 28, 1961 and April 7, 1963. Counts IX and X were thereafter dismissed. After a non-jury trial the district court convicted Lustiger on the remaining seventeen counts. Lustiger then took this appeal.

Appellant's primary contention is that the evidence adduced at the trial was insufficient to support the trial court's finding and conclusion that he engaged in a scheme to defraud or obtain money by means of false or fraudulent pretenses, representations or promises. It was stipulated prior to trial that appellant used the mail in connection with his land sales.

Since this is an appeal from a determination of guilt, we must view the evidence and all reasonable inferences therefrom in the light most favorable to the Government. *Kaplan v. United States*, 9 Cir., 329 F.2d 561.

Lustiger's real estate activities in Mohave County, Arizona, got under way on September 7, 1960, when he formed the Lake Mead Land and Water Company (company), an Arizona corporation. Lustiger and his family owned all of its stock and he, alone, was responsible for the policy-making and management of the company. The company thereafter acquired ownership or options to purchase approximately sixty-four sections of land in Mohave County, about sixty miles from Kingman, Arizona.

These sections consisted of the odd-numbered sections in a checkerboard pattern, the even-numbered sections being owned by the federal government. The company subdivided twenty of these sections, consisting of 9,844 acres, into 6,548 parcels. The company then offered to the public, for sale, all or part of eleven of these sections, consisting of 6,400 acres subdivided into 4,247 parcels. The company called this unincorporated subdivision "Lake Mead City."

In its sales operations, the company utilized the United States mails. Lustiger organized Arizona Associated Advertising Agency to handle the advertising for the company. The company, through Lustiger, informed all customers that mail should be sent to the company at P.O. Box 13349, Phoenix, Arizona.

Actually, the company had only a part-time employee to receive and send mail from that address. This employee forwarded all mail received to Lustiger at Azusa, California. After receipt, Lustiger processed the mail through his National Land Company and returned it to Phoenix by bus. The part-time employee then placed the correspondence in the mail. All checks were cashed at a Phoenix bank.

Lustiger caused the company to advertise its property in newspapers and other publications throughout the country. Those who answered were sent an "Investor's Kit," consisting of a thirty-two page color brochure, a "Fact Sheet," and a land reservation form. If the reservation form was returned to the Phoenix Post Office box with a ten dollar refundable deposit, Lustiger caused the

company to send the customer a vicinity map on which was marked his subdivision unit (section) and a plat map showing his individual parcel, together with a purchase contract for execution.[1]

Land which cost Lustiger from $33.20 to $125 an acre was in this way sold in one and a quarter acre parcels for from $395 to $495. In the "Lake Mead City Building Area," the price was $695 for one and a quarter acres.

As part of the company's policy to provide its customers with a "gilt-edge" to their investment, the company, through Lustiger, maintained both an exchange policy and a refund policy. Under the exchange policy, customers who had purchased lots in the ten units within which the company had not installed roads, staked lots, or provided parcel identification markers, could trade for property in the "improved" building area. The trade cost the customer nothing, provided he built within five years of the exchange; otherwise, the customer only received credit for his equity in the unimproved unit against the higher purchase price for a lot in the building area. Under the refund policy, if for any reason a customer changed his mind or was not completely satisfied within thirty days, his money was returned without question.[2]

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[1]Sometime after the project got under way, customers were furnished with certain additional materials. These included a copy of the May, 1962 *Arizona Highways* magazine, containing a map of the general area; a "price increase notification sheet"; a "newsletter"; a "land investment" sheet; and the official Arizona State Highway Department 1962 road map.

[2]Additionally, on April 29, 1963, which was more than five months after Lustiger became aware that his activities were under investigation by the Post Office Department, the company mailed to all of its customers a refund offer, with which the company strictly complied. This offer was as follows:

> ". . . any customer who inspects Lake Mead City prior to September 1, 1963, and is then dissatisfied with his purchase for any reason whatsoever, will be given the right at that time to sign a request for a full refund at the Information Office on the property, and that all such requests so signed at that time will be honored. If for any reason you may be unable to visit Lake Mead City this summer, please notify the company within the next fifteen days and a reasonable extension to this offer will be granted. The company very much would like to keep every one of its valued customers, but most of all, the company wants them all happy."

The advertising brochure which Lustiger had the company distribute, entitled "Join Us for Pleasure and Profit at Lake Mead City," contained numerous statements describing the asserted advantages of Lake Mead City. In addition, the brochure contained many photographs purporting to depict scenes in the area. Sales generated by this extensive advertising program continued until May, 1962. At that time the advertising campaign was discontinued as the result of litigation over the company's title to the land. By March 10, 1962, three thousand lots had been sold.

Paragraphs 7 through 11 of Count I of the indictment, made applicable to all counts, charge that Lustiger's advertising materials contained misleading, deceptive, false and fraudulent pretenses, representations and promises concerning the property. These paragraphs further charge that these alleged misleading, deceptive, false and fraudulent pretenses were part of a scheme by Lustiger to defraud land purchasers.

The alleged verbal and photographic statements of this kind pertained to such matters as investment potential, status as a "planned community," desirability of location, favorable deed restrictions, character as a "resort area," quality as compared to other Arizona land, proximity to Lake Mead National Recreation Area, proximity to water sports, presence of a "Joshua tree forest," access, proximity to Kingman, Arizona, availability of power and telephone facilities, adequacy of domestic water supply, surveys and platting, existence of houses in the Lake Mead City development, care taken in choosing lots for individual purchasers, prospective price increases because of rapidly increasing values, and scarcity of remaining lots.

In addition to statements of the kind described above, the indictment charges that Lustiger failed to disclose the following material facts: all units of the development were located in odd-numbered sections, widely scattered in five different townships; the alternate even numbered sections, owned by the federal government, were used for grazing; many units had rocky hills and unbridged natural drainage washes; only a few units had convenient access; the nearest available power and telephone lines were many miles away; most units did not have street signs, lot corner markers or lot identification markers; and some units were many miles from a domestic water supply.

On this appeal Lustiger argues that some of the asserted statements and concealments listed above did not involve material facts. As to the remainder, Lustiger contends the evidence failed to establish that the representation of a material fact was false, or that a material fact had been fraudulently concealed. Further, he contends that all the statements constituted only "seller's puffing," and were not sufficient to establish a scheme to defraud land purchasers.

Lustiger did not request the trial court to find the facts specially, as he might have done under Rule 23(c), Federal Rules of Criminal Procedure, and no special findings were entered. It follows that we must assume that the trial court found in favor of the Government with respect to each and every alleged statement or concealment relied upon by the Government.

This being the case, Lustiger cannot obtain reversal on the ground that some of the representations or concealments of material fact relied upon by the Government were not proved to be false, misleading or deceptive. As long as a sufficient number of the statements were shown to be knowingly false, deceptive or misleading, to permit the trial court to infer that defendant intentionally engaged in a scheme to defraud, the conviction must be affirmed. *Ballard v. United States*, 9 Cir., 138 F.2d 540, 545.

One of the categories of alleged misleading, deceptive and false statements contained in Lustiger's advertising materials relates to the availability of water, both for recreational and domestic uses. The color brochure contains numerous photographs, most of which depict water scenes on or around Lake Mead. The lake is said to be only five miles from Lake Mead City. Other photographs show small lakes and ponds, purportedly located within the boundaries of Lake Mead City. One body of water is colorfully described as the "Favorite swimming hole." Another picture shows a large metal water tank lying horizontally alongside a windmill, with the printed declaration: "IMPORTANT! Plenty of Water." A vicinity map "Depicting Lake Mead City Area," distributed by Lustiger, shows two wells, three springs and a water pipe line.

Lustiger does not deny that these representations were made, nor does he question the materiality of the facts presented. He

argues, however, that the court's presumptive finding that the representations were misleading, deceptive and false was not supported by the requisite degree of proof.

Our examination of Lustiger's advertising materials reveals that the statements, photographs and maps, unaccompanied by true statements concerning the lack of available water, could reasonably have led a person of average intelligence and experience to believe that all parcels offered for sale had reasonable access to a water supply.[3] While the statements in the advertising materials may not have been literally false, taken as a whole they were fraudulently misleading and deceptive.

It is true that, measured by a straight line, Lake Mead is only five miles from the boundary of Lake Mead City. However, Lustiger did not reveal that by existing roads Lake Mead is fifteen miles from the nearest and forty miles from the farthest Lake Mead City unit. Moreover, most of the units did not have access presently available by ordinary motor vehicles. Thus, a purchaser may in fact have a long, if not impossible, route to travel to enjoy the benefits of Lake Mead.

Likewise, all the water scenes in Lustiger's brochure were taken within the boundaries of Lake Mead City. Undisclosed to the prospective purchaser, however, was the fact that none of the pictured bodies of water were on land owned or optioned by Lustiger's company. These photographs were taken at the Diamond Bar Ranch which is near the center of the general area where Lake Mead City is located. There was evidence that a few children had used the pictured water pond for swimming. The foreman of this ranch testified, however, that the "Favorite swimming hole" depicted in the brochure was not a swimming

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[3]This is not to say that representations and concealments will necessarily pass muster if they do not deceive a person of average intelligence experience. In *Lemon v. United States*, 9 Cir., 278 F.2d 369, court said:

> "It is immaterial whether only the most gullible would have been deceived by this technique. Section 1341 protects the naive as well as the worldly-wise, and the former are more in need of protection than the latter. United States v. Sylvanus, 7 Cir., 192 F.2d 96, 105. As a matter of fact, '. . . the lack of guile on the part of those solicited may itself point with persuasion to the fraudulent character of the artifice.' Norman v. United States, 6 Cir., 100 F.2d 905, 907."

hole but was a dirt stock tank for stock water with perhaps two feet of mud on its bottom.

The vicinity map depicting several sources of water for domestic use follows a similar pattern of deception. Lustiger failed to disclose that the only source of water on the property owned by the company and available to purchasers during the period charged in the indictment was the Clearwater Well, located in the far northwest corner of the Lake Mead City units, a distance of twenty-eight miles from some subdivision units.[4] In order to obtain water for domestic use, practically all lot purchasers would have to haul their water from the Clearwater Well and provide storage on their own lots. Moreover, as noted above, most of the subdivision units were not accessible by ordinary motor vehicles.

This same pattern of fraudulent deception runs through much of Lustiger's advertising materials.

The brochure informed prospective purchasers that all parcels had been platted and recorded, "with road easements laid out to assure you of access." Although the accompanying "Fact Sheet" warned that no streets were presently available, prospective customers were not told that the terrain in many of the units made actual construction of a road physically impracticable or unreasonably expensive. Customers were not advised that, except in the building area, no street or lot markers existed to enable a purchaser to determine the location of his lot or the boundaries of his road easement.

The brochure stated that all Lake Mead City properties "are within the franchised area of Citizen's Utilities Company, with regard to power and telephone." This statement is literally true. But to one who had not inspected the property, this would indicate that power and telephone service could be made available by a reasonable expenditure. Although the "Fact Sheet" stated that utilities were not presently available, Lustiger failed to disclose that the nearest existing electric power lines and telephone lines are approximately twenty-one miles from the nearest, and thirty-eight miles from the farthest, of the Lake Mead City subdivision units. According to the testimony, Lake

[4] After the indictment was returned the company acquired another well and built a water tank. It also obtained options on other water resources.

Mead Land and Water Company would not pay the cost of bringing electric power or telephone lines to any of the units in the subdivision.

The brochure described the real estate development as "Lake Mead City . . . an enchanted city in the making . . . ," and advised: "Lake Mead City, Arizona's best located planned community," "Lake Mead City planning and restrictions assure you of properties that will always be favorably looked upon by discriminating purchasers," "Now, for only pennies a day, you can participate in one of the best planned and fastest selling resort areas in Arizona."

The trial court was warranted in finding that the use of the words "Lake Mead City" in the subdivision name, taken in conjunction with the phrases quoted above were intended to mislead prospective customers into believing that a planned city or community had already been started and was rapidly growing.

In fact, no city or community of residents, or building improvements of any kind, were in existence up to March, 1963, except for a small field office used by the company and a temporary dwelling occupied by a guide and caretaker. By the time of the trial, five houses were in various stages of completion in Lake Mead City. There was no plan to construct or provide housing or shopping facilities, or provide the utilities necessary to the development of a planned city or community. The company apparently did plan to install additional rough dirt streets, street signs, lot stakes and identification markers, but little had been done on this. There were no permanent occupants in any of the subdivision units.

Moreover, none of the maps distributed by Lustiger indicated what land within the boundaries of the Lake Mead City area was actually owned by the company and was intended to become a part of the "city." Customers were not informed that the company owned only the odd-numbered sections, the even-numbered sections belonging to the federal government for grazing, mining and recreational purposes. Of the 186 sections pictured in Lustiger's vicinity map as "Depicting the Lake Mead City Area," only eleven sections, widely scattered geographically in five different townships, were actually offered for sale to the public. Finally, customers were not told that large washes, rocky

hills, and steep cliffs separated many of the subdivision parcels, making reasonable travel between them in the future highly unlikely.

The story is the same with regard to other matters of interest to one considering the purchase of property in a rural subdivision. The evidence is overwhelming that Lustiger's advertising materials were in some respects false and, apart from falsity were, when considered as a whole, fraudulently deceptive and misleading, exhibiting an intent and purpose to defraud.

If a scheme is devised with the intent to defraud, and the mails are used in executing the scheme, the fact that there is no misrepresentation of a single existing fact is immaterial. It is only necessary to prove that it is a scheme reasonably calculated to deceive, and that the mail service of the United States was used and intended to be used in the execution of the scheme.[5]

Moreover, deceitful statements of half truths or the concealment of material facts is actual fraud violative of the mail fraud statute. *Cacy v. United States*, 9 Cir., 298 F.2d 227, 229; *Williams v. United States*, 10 Cir., 358 F.2d 972, 975. In addition, as the Tenth Circuit said in *Gusow v. United States*, 10 Cir., 347 F.2d 755, 756, the deception need not be premised upon verbalized words alone. The arrangement of the words, or the circumstances in which they are used may convey the false and deceptive appearance.

Lustiger argues that the above-mentioned advertising statements constitute "seller's puffing" and are not indictable under the mail fraud statute. While it is true that exaggeration within reasonable bounds under the circumstances will not support a finding of a scheme to defraud, a substantial deception, as evidenced here, is sufficient. Moreover, here prospective buyers were expected to rely almost entirely on the advertising materials in making their purchase. Only a few buyers saw the property before signing the purchase contract. Under these circumstances courts cannot be blind to the increased potential for a fraudulent scheme to trap the unwary.

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[5] *Irwin v. United States*, 9 Cir., 338 F.2d 770, 773; *Lemon v. United States*, 9 Cir., 278 F.2d 369, 373; *Gregory v. United States*, 5 Cir., 253 F.2d 104, 109; *Kreuter v. United States*, 5 Cir., 218 F.2d 532, 535; *Silverman v. United States*, 5 Cir., 213 F.2d 405, 407.

Lustiger also argues that his refund and exchange policies negate any finding of fraudulent intent. We disagree. While such policies may be evidence of good faith, they do not necessarily negate a finding of bad faith. See *United States v. Sylvanus*, 7 Cir., 182 F.2d 96, 105. Here the exchange policy was conditioned on building within a certain period of time, and the refund policy was limited to thirty days. Furthermore, as the evidence here reveals, disgruntled purchasers are not likely to take advantage of refund guarantees. Once the fraudulent character of the original purchase reveals itself, the integrity of the refund promisor, along with the purchaser's incentive to request a refund, evaporates.

We conclude that the evidence is sufficient to support a finding that Lustiger intentionally engaged in a scheme to defraud.

Lustiger contends that the trial court erred in denying his pre-trial motion to suppress Government evidence on the ground that it was derived from an illegal "mail watch."

The motion was supported by an affidavit to the effect that a postal inspector had taken possession of mail addressed to Lustiger's Lake Mead City, as it arrived at the latter's Phoenix, Arizona, mail box, and copied therefrom the name and addresses of Lustiger's customers. It was also alleged in the affidavit that all the evidence which the postal inspector thereafter procured from the customers derived from this asserted "mail watch."

A hearing was held before the trial court, with a reporter present, but Lustiger has not provided a transcript of that hearing for our use on this appeal. We must therefore assume, as the Government represents, that at the hearing the Government asserted that Lustiger's mail had not been delayed, and that this was conceded by Lustiger's counsel at the hearing. It is also to be noted that the affidavit filed in support of the motion to suppress did not allege delay.

In arguing the point on this appeal, Lustiger relies upon the Fourth Amendment, 18 U.S.C. § 1703 (1964), and 39 C.F.R. § 3.1 (Dec. 6, 1961).

The protection against unreasonable search and seizure of one's papers or other effects, guaranteed by the Fourth Amend-

ment extends to their presence in the mails. *Ex Parte Jackson*, 96 U.S. 727; *Oliver v. United States*, 8 Cir., 239 F.2d 818, 820-21. Thus, first class mail cannot be seized and retained, nor opened and searched, without the authority of a search warrant. See *Weeks v. United States*, 232 U.S. 383; *Oliver, supra*. However, the Fourth Amendment does not preclude postal inspectors from copying information contained on the outside of sealed envelopes in the mail, where no substantial delay in the delivery of the mail is involved. See *Canaday v. United States*, 8 Cir., 354 F.2d 849, 856.

Likewise, a "mail watch" of the kind described above, involving no substantial delay, does not violate 18 U.S.C. § 1703 (*United States v. Costello*, 2 Cir., 255 F.2d 876, 881), or the postal regulations. *United States v. Schwartz*, 3 Cir., 283 F.2d 107.

Lustiger argues that the trial court erred in denying his motion for disclosure of the minutes of the grand jury and, on the basis of that disclosure, for dismissal of the indictment.

In support of this motion counsel for Lustiger filed an affidavit alleging among other things, and upon information and belief, that: evidence concerning the indictment was presented to the grand jury on July 16, 17, October 24 and 25, 1963; of the twenty-three members of the grand jury, two attended none of these sessions; only seventeen attended the sessions held on July 16 and 17; only twenty attended the sessions held on October 24 and 25, the latter session being the one at which the jury returned the indictment; and the vote was fifteen for indictment and five against indictment.

Had the minutes of the grand jury disclosed the facts to be as stated in the affidavit referred to above, this would have provided no basis for dismissing the indictment. Individual grand jurors comprising more than a quorum attended all sessions, and were present when the vote was taken on the indictment. See *United States ex rel McCann v. Thompson*, 2 Cir., 144 F.2d 604. Therefore the trial court did not err in denying the above-described motion.

Lustiger contends that the indictment is invalid in that it charged conduct which is protected by the First Amendment guarantee of freedom of speech. In support of this contention,

Lustiger asserts that in framing its indictment the Government took out of context portions of statements contained in the advertising brochure and charged defendant with a fraudulent scheme based upon such segregated portions.

Lustiger's description of the indictment is inaccurate. It is true that, in paragraph 7 of Count I, made applicable to all counts, nineteen separately-quoted statements attributed to Lustiger are characterized as "misleading, deceptive, false and fraudulent pretenses, representations and promises. . . ." But this paragraph also states that the quoted excerpts are contained in the advertising brochure, and that the presence of these statements therein was a "part" of the scheme and artifice to defraud. The fact-finder was not thereby invited to consider these statements out of context, nor did the Government adopt such a course at the trial. The Government's exhibit 37 series listed the six different printings of the brochure, a copy of each printing was made an exhibit so that the whole document could be examined by the trial judge who was the fact-finder.

Apart from his point that the fact-finder was asked to consider the quoted statements out of context, Lustiger seems also to be urging that the statements are not clearly fraudulent and are therefore protected by the First Amendment. This contention is answered by what we have said concerning the sufficiency of the evidence to support the finding of guilt.

Lustiger argues that the trial judge erred in excluding exhibits and opinion testimony concerning the activities of competing subdividers in Arizona, and exhibits relating to the activities of the Federal Bureau of Land Management in Arizona. Lustiger offered these materials for the threefold purpose of establishing the standards of the industry of which his company was a member, showing the value of the land in question, and to support defendant's position that the Government had failed to prove bad faith. The evidence was rejected on the ground that it lacked materiality.

The rejected exhibits bearing upon the activities of competing subdividers consisted of a compendium of ads and promotional materials used at the same time by other Mohave County subdividers in promoting Lake Mohave Ranchos, Lake Mead Ranchos,

Meadview, Golden Valley and Paradise Acres.[6] Defendant states that this exhibit demonstrates that: (1) although every Mohave County subdivision has the same checkerboard pattern as that of Lustiger's Lake Mead City, not one of the competing subdividers advised this in their materials; (2) the competitors used imagination in the naming of their subdivisions that far outdid Lustiger's efforts in this direction; (3) all of the competitors displayed in their materials a flamboyancy that exceeds that of Lake Mead City's materials; and (4) the price of land in the nearby competing subdivisions greatly increased during the period charged in the indictment and in every instance exceeded Lake Mead City's price for its acreage.

The admission or exclusion of evidence of this general character, for the purposes described, rests within the sound discretion of the trial court. Whether, in a particular case, there was an abuse of such discretion depends upon the circumstances of the case.[7]

If, in our case, the tendered evidence concerning the real estate activities of competitors had been received, the Government would have been entitled to show the truth or falsity of these third-party advertising materials. The trial court could reasonably

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[6] While these advertising materials were rejected, pictures of adjoining developments were admitted.

[7] In *United States v. Brandt*, 2 Cir., 196 F.2d 653, 657, a mail fraud prosecution involving a drive for charitable contributions, it was held that the trial court erred in excluding evidence that, as defendant had done, a number of reputable charities retained professional fund raisers on a contingent basis. In *United States v. Sprengel*, 3 Cir., 103 F.2d 876, 881, a mail fraud prosecution involving a scheme to obtain funds from the "heirs" of the mythical Baker estate, it was held that the trial court properly permitted the prosecution to introduce evidence as to the activities of other "Baker estate" groups, known to the defendant. In *Silkworth v. United States*, 2 Cir., 10 F.2d 711, 720-21, a mail fraud prosecution involving the operation of a so-called bucket shop, it was held that the trial court did not err in permitting cross-examination of the defendant concerning the method of operation of other members of the same stock exchange, the purpose being to show that defendant was aware of the operations of his partnership. On the other hand, in *United States v. Hofmann*, 10 Cir., 353 F.2d 188, 191, a mail fraud prosecution involving a scheme to defraud purchasers of land, it was held that the trial court properly excluded, as immaterial, evidence tending to show that the same scheme had been previously used by others.

foresee that this would, in effect, lead to the trial of four or five other mail fraud cases, and could properly conclude that a fair trial of defendant's case did not require such collateral inquiries. The rejection of this evidence did not constitute an abuse of discretion.

We reach a similar conclusion, for substantially the same reason, with regard to the exclusion of exhibits relating to the Arizona activities of the Federal Bureau of Land Management.

The rejected opinion was that of Frank E. Glindmeier, former president of the Arizona League of Land Developers. The opinion was expressed in a letter, written by Glindmeier to Lustiger's trial counsel, which letter was conceded by the Government to be authentic. The gist of Glindmeier's opinion, as stated in this letter, was that the advertising representations and materials, sales techniques and devices used by Lake Mead City during 1961 and 1962 were:

> ". . . well within the range of advertising representations and materials, sales techniques and devices generally and customarily deemed proper during that period, and generally and customarily used during that period by land subdividers who then were and now are considered entirely proper and ethical by the industry itself and the public as a whole."

What the custom among the land subdividers of the area was concerning advertising representations, sales techniques and related devices, is immaterial. Likewise immaterial is the view which subdividers and the general public of the area then entertained concerning the ethics of the existing practice. It was for the trial court, as the fact-finder, to determine whether there was a scheme or artifice to defraud within the meaning of 18 U.S.C. § 1341. In making that determination the standards set up by Congress in that statute, and not those actually or assertedly held by subdividers and members of the public at the time and place in question, must govern.

Lustiger would be the first to object if his activities met the tests of section 1341, but he was convicted on evidence that competitors and the general public held to a higher standard. The principle behind such a justifiable objection works both ways

—the only relevant test is that provided by the statute. The trial court did not err in excluding this exhibit.

Lustiger's contention that, in other respects, the trial court erred in admitting and excluding evidence has been examined, but we find no error.

Lustiger argues that the trial court erred in denying his motion to dismiss the indictment on the ground that it, and each count thereof, failed to state an offense against the United States, and on the further ground that each count of the indictment was duplicitous. He further argues that the trial court erred in denying his pretrial motions for discovery and inspection of documents and for a bill of particulars.

We have examined each of these arguments and find them to be without merit.

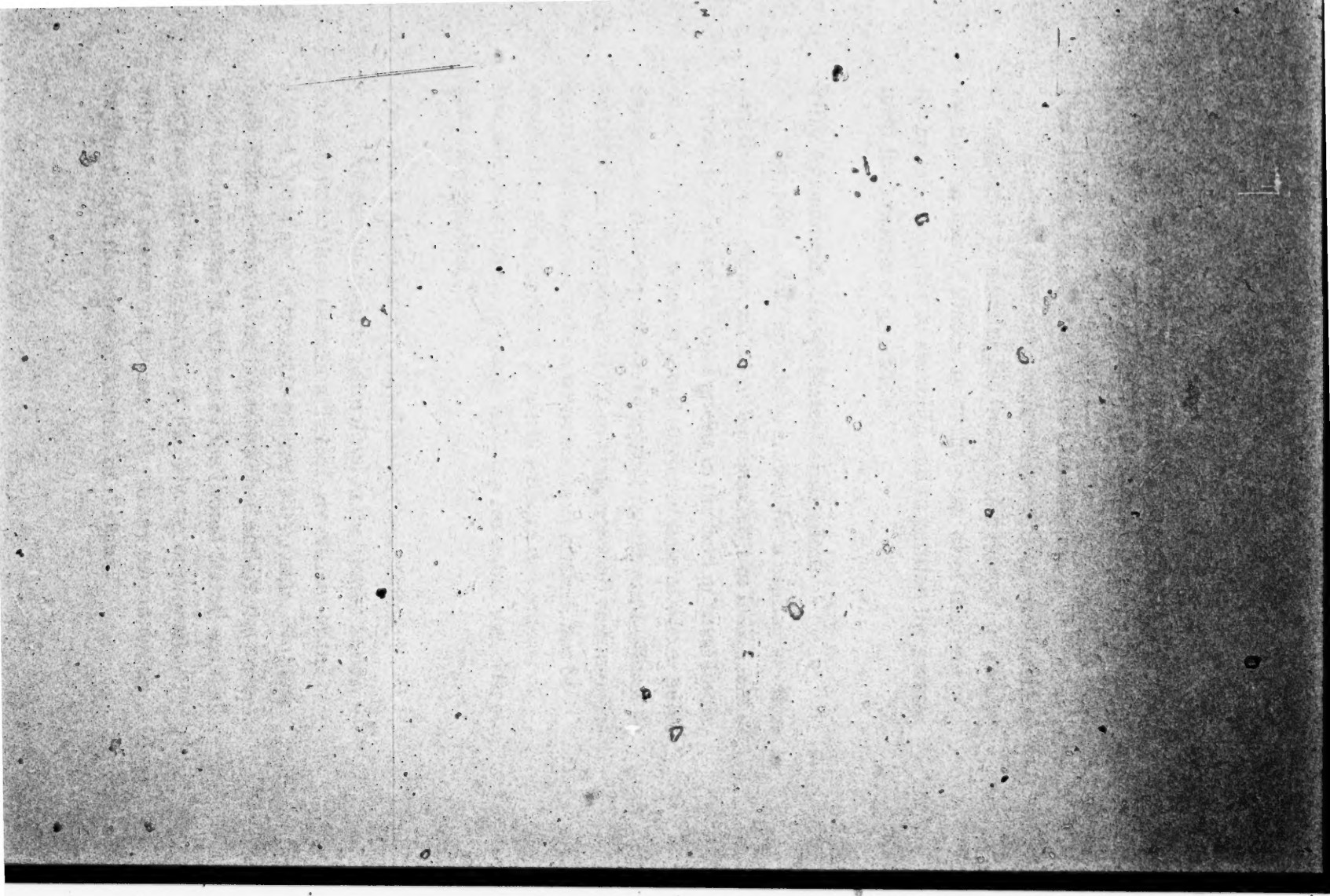
Finally, Lustiger argues that his conviction must be reversed for the reason that he was deprived of effective representation of counsel, in violation of the Sixth Amendment.

This contention was first made on September 27, 1966, in a motion for remand for a new trial on the ground of newly-discovered evidence. The motion was filed in this court by new counsel for Lustiger, the latter's trial counsel having been murdered by his wife on March 25, 1966. On October 24, 1966, another panel of this court denied, without prejudice, the motion for remand, with the suggestion that Lustiger file a motion for a new trial in the district court. The order further provided that if the district court then filed a statement in its record that it wishes to hear the motion before disposition of the pending appeal, Lustiger could renew his motion in this court for a remand.

Lustiger filed such a motion for a new trial in the district court on January 5, 1967. On January 9, 1967, the district court entered a statement that it did not then want to hear the motion. Lustiger then renewed his motion for remand in this court, notwithstanding our earlier order indicating that such a motion would not be entertained during the pendency of the appeal unless the district court indicated a willingness to consider the motion for new trial prior to disposition of the pending appeal. Another panel of this court denied the renewed motion for a remand.

The grounds on which Lustiger asserts that he did not have effective representation of counsel at his trial are of a kind which must first be examined by the district court, since alleged facts outside of the present record are relied upon. Accordingly, we cannot deal with this contention on the record before us, but leave Lustiger to his remedy under Rule 33, Federal Rules of Criminal Procedure, pertaining to motions for a new trial.

Affirmed.



APPENDIX "C"

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment, United States Constitution:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Fifth Amendment, United States Constitution:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 18, U.S.C., Sec. 1341:

"Whoever, having devised or intended to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 763; May 24, 1949, c. 139, Sec. 34, 63 Stat. 94."

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
County of Los Angeles)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Los Angeles, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 215 West Fifth Street, Los Angeles, California 90013, that on , I served the within Petition For Writ of Certiorari (Lustiger v. U.S. of America) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Los Angeles, California, addressed to said parties at the addresses as follows:

Solicitor General of the United States
Washington, D. C. [3 copies]

United States Court of Appeals
For the Ninth Circuit
U.S. Post Office and Courthouse Bldg.
7th & Mission Sts.
San Francisco, California 94101 *[1 copy]*

U.S. Attorney's office
Miss Jo Ann Diamos
Assistant U.S. Attorney
412 Post Office & Federal Bldg.
Tucson, Arizona [3 copies]

I declare under penalty of perjury that the foregoing is true and correct.

Executed on at Los Angeles, California.

Subscribed and sworn to before me
this day of

Notary Public in and for the
State of California.

Orig. & 40 cys.
lodged with Supreme
Court of the United
States

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 988

MARVIN LUSTIGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 1967 (Pet. App. A). On December 9, 1967, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari until January 5, 1968, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's conviction of mail fraud.

2. Whether the trial court erred in excluding evidence tendered by petitioner on the issue of his good faith.

3. Whether the mail fraud statute, as applied, violated petitioner's right of free speech.

STATEMENT

Following a trial without a jury in the United States District Court for the District of Arizona, petitioner was convicted on counts 1–8 and 11–19 of a 19-count indictment charging that he used the mails in furtherance of a scheme to defraud, in violation of 18 U.S.C. 1341 (1 R. 2–22; 4 R. 621).[1] The scheme, which was alleged to have been devised some time prior to September 7, 1960, and to have continued to October 25, 1963, the date of the return of the indictment, involved mail order sales of lots in a real estate development known as "Lake Mead City", in Mohave County, Arizona (1 R. 2, 331). Each count charged a separate mailing in execution of the scheme, the details of which were set forth in count 1 and repeated by reference in the remaining counts. On June 28, 1965, petitioner was sentenced to pay a fine of $1,000 on each of counts 1–8 and 11–18—a total of $16,000. The imposition of sentence on count 19 was suspended for six months on condition that the fines be paid within 90 days (1 R. 232). The court of appeals affirmed (Pet. App. A, B).

Since petitioner continues to challenge the suffi-

[1] Counts 9 and 10 were dismissed on motion of the government at the conclusion of the government's case (3 R. 416).

ciency of the evidence, the testimony and exhibits must be recounted in some detail: [2]

On September 7, 1960, petitioner organized the Lake Mead Land and Water Company ("the company"), an Arizona corporation all of whose stock was owned by petitioner and his family, and for whose management and policies petitioner alone was responsible. The company acquired ownership of, or options to buy, land in Mohave County, approximately 60 miles from Kingman, Arizona. The tracts consisted of the odd-numbered sections in a checkerboard pattern; the even-numbered sections were owned by the federal government. After subdividing the tracts, the company offered to sell some of the parcels to the public. The company called the area in which the lots were located "Lake Mead City"—after a lake of that name in the vicinity (3 R. 359, 361, 370, 393; Pet. App. B. 2).

Persons responding to the nationwide advertising campaign were sent an "Investor's Kit", consisting of a 32-page color brochure, a "Fact Sheet", and a land reservation form. Land which had cost petitioner from $33.20 to $125 an acre ($40 on the average) was sold in this way at prices ranging from $395 to $495 per 1¼-acre parcel. In a part of the project described as the "building area" the price was $695 for lots of this size. Sales continued until May 1962, when the advertising program was discontinued as the result of litigation over the company's title to the land. By March 10, 1962, three thousand lots had been sold (3 R. 361–

[2] The evidence is set forth in greater detail in the opinion below (Pet. App. B. 2–9).

363, 366–369; Pet. App. B. 2–3, 4). To provide its customers with a "gilt-edge" to their investment, the company offered a refund to any buyer who changed his mind or was not satisfied with his purchase, if he applied for a refund within 30 days (Pet. App. B. 3).[3]

Although correspondence was to be addressed to a designated post office box number in Phoenix, Arizona, the company in fact had only a part-time employee in that city. Petitioner processed the mail in Azusa, California, and then had the answers transported by bus to Phoenix, to be posted there by the employee. All checks were deposited in a Phoenix bank (2 R. 79–82; 3 R. 359, 362, 374; Pet. App. B. 2).

The advertising brochure which each prospective customer received contained numerous statements describing the asserted advantages of Lake Mead City. The development was described as "an enchanted city in the making" and Arizona's "best located planned community". While the brochure represented that all parcels had been platted and recorded, "with road easements laid out to assure you of access", most of the subdivision units were inaccessible by ordinary passenger automobiles, and except in the "building area" (located in one of the units) there were no streets, street signs, lot stakes, or lot identification markers. The "Fact Sheet" which accompanied the brochure did warn that no streets were presently available, but

[3] In addition, on April 29, 1963—more than five months after petitioner became aware that his activities were under investigation—the company offered to make a refund to any customer who expressed dissatisfaction with his purchase after visiting the site, provided he did so prior to September 1 of that year (Pet. App. B. 3, n. 2).

prospective customers were not told that the terrain in many of the units made actual construction of roads physically impracticable or unreasonably expensive. Nor was there mention that, except in the building area, no street or lot markers existed to enable a purchaser to determine the location of his lot or the boundaries of his road easement (1 R. 7, 10; 3 R. 364–365, 376-377; Pet. App. B. 7, 8).

One of the categories of allegedly deceptive and misleading statements contained in the advertising materials related to the availability of water, both for recreational and domestic uses. The brochure contained numerous photographs depicting water scenes on and around Lake Mead. The lake was said to be only five miles from Lake Mead City. Other photographs showed small lakes and ponds, purportedly located within the boundaries of Lake Mead City. One body of water was described as the "favorite swimming hole". A picture of a large metal water tank was accompanied by the printed assurance: "IMPORTANT! Plenty of Water" (1 R. 9, 10, 11; Pet. App. B. 5).

Although Lake Mead was within five miles of the nearest boundary of Lake Mead City if measured by a straight line, by existing roads the lake was 15 miles from the nearest and 40 miles from the farthest Lake Mead City unit (3 R. 393). Moreover, as noted above, most of the units were inaccessible by ordinary motor vehicles. While some of the water scenes depicted were within the outer boundaries of Lake Mead City, none of the pictured bodies of water was on land owned or optioned by petitioner's company. The photographs were taken on a ranch in which the

company had no interest, situated near the center of the area in which Lake Mead City was located. The body of water described as the "favorite swimming hole" was in fact a dirt tank for stock water, with two feet of mud on its bottom (3 R. 270–271; Pet. App. B. 6–7).

The vicinity map depicted several sources of water for the domestic use of lot purchasers; actually, the only source of water available for this purpose that was on property owned by the company was the Clearwater Well, located in the far northwest corner of the development, a distance of 28 miles from some subdivision units (3 R. 365–366, 394; Pet. App. B. 7).[4] In order to obtain water for domestic use, lot purchasers would be required to haul it from this well (or from Kingman, 60 miles away) and store it on their individual lots—or else dig their own wells (3 R. 366; Pet. App. B. 7).

The brochure stated that all Lake Mead City properties were "within the franchised area of Citizen's Utilities Company, with regard to power and tele-

[4] Without supporting citations to the record, petitioner says that the court of appeals was inaccurate in making this point. (Pet. 7–8; Pet. App. B. 7). He states that the company owned rights in the King Tut Water Pipeline and other wells and springs (Pet. 7–8). The court's statement is based on petitioner's own acknowledgment to a postal inspector in an interview held on November 10, 1962, after the investigation of his activities had begun (3 R. 358, 365–366). Petitioner specifically denied at that time that his company had an interest in the King Tut Pipeline. He said that the Clearwater Well (in which his company had a half interest) "was the only source of water Lake Mead City controlled and made available to their people" (3 R. 366).

phone". While this statement was literally true, and although the "Fact Sheet" acknowledged that utilities were not presently available, petitioner did not disclose that the nearest existing power and telephone lines were 23 miles from the nearest and 38 miles from the farthest Lake Mead City subdivision units. The company would not pay the cost of bringing power or telephone lines to any units of the development (1 R. 9; 3 R. 393; Pet. App. B. 7–8). The brochure also pointed out the "Modern schools, churches and shopping facilities in nearby Kingman * * *" (Pet. 19), although not until the second edition of the "Fact Sheet" did petitioner even mention that Lake Mead City is at least 60 miles from Kingman.

Notwithstanding the brochure's description of Lake Mead City as Arizona's best located "planned community", no community of residents or building improvements of any kind were in existence up to March 1963—seven months prior to the return of the indictment and five months after petitioner had become aware that his activities were under investigation—except for a small field office used by the company and a temporary dwelling occupied by a guide and caretaker. By the time of the trial, five houses were in various stages of completion (Pet. App. B. 8).

ARGUMENT

1. The district judge, as trier of the facts, found petitioner guilty. A unanimous court of appeals, on the basis of its careful review, found the evidence "overwhelming" that petitioner's advertising materials "were in some respects false and, apart from falsity were, when considered as a whole, fraudulently

deceptive and misleading, exhibiting an intent and purpose to defraud" (Pet. App. B. 9). Petitioner has suggested no reason why this Court should be called upon to provide further review of the sufficiency of the evidence. In any event, his contention that the evidence was insufficient (Pet. 10–31) is devoid of merit.

The indictment charged that petitioner's advertising materials contained numerous misleading, deceptive, false and fraudulent representations concerning the land offered for sale (1 R. 6–12).[5] In addition it charged that petitioner willfully concealed material facts from the persons intended to be defrauded (1 R. 12–14).[6] As the court of appeals pointed out (Pet. App. B. 5), petitioner did not ask the trial court to find the facts specially, as he might have done under Rule 23(c) of the Federal Rules of Criminal Proce-

[5] The alleged misrepresentations involved such matters as the land's investment potential, its status as a "planned community", its character as a "resort area", its proximity to water sports, the availability of power and telephone facilities, the adequacy of a domestic water supply, and the existence of houses in the development.

[6] The matters allegedly concealed included such facts as that all units of the development were located in odd-numbered sections, widely scattered in five different townships; that the alternate (even-numbered) sections, owned by the federal government, were used for grazing; that many units had rocky hills and unbridged natural drainage washes; that only a few of the units were adjacent to existing county-maintained roads and many were not accessible at all by ordinary motor vehicles; that the nearest available power and telephone lines were between 23 and 38 miles away; that most units did not have street signs or lot identification markers; and that some units were many miles from a domestic water supply.

dure,[7] and no special findings were entered. It follows that, as the court below noted (Pet. App. B. 5), the trial court must be presumed to have found in favor of the government with respect to each alleged misstatement and concealment relied on. This being so,[8] petitioner cannot prevail on his argument that some of the statements may have involved only "puffing", or that some of the representations and concealments were not material or were not shown to be false or deceptive. As long as the number of the statements shown to be knowingly false, deceptive, or misleading was sufficient to permit the inference that petitioner intentionally engaged in a scheme to defraud, the conviction was proper.[9] *Ballard* v. *United States*, 138 F. 2d 540, 545 (C.A. 9), reversed on other grounds, 322 U.S. 78; *Holmes* v. *United States*, 134 F. 2d 125, 133 (C.A. 8), certiorari denied, 319 U.S. 776; *Graham* v. *United States*, 120 F. 2d 543, 546 (C.A. 10); *Baker* v. *United States*, 115 F. 2d 533, 542 (C.A. 8), certiorari denied, 312 U.S. 692.

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[7] Rule 23(c) provides that "[i]n a case tried without a jury the court shall make a general finding and shall in addition on request find the facts specially." Petitioner expressly waived his right under this Rule to request special findings (1 R. 231).

[8] It was stipulated that petitioner had disseminated his advertisements through the mails.

[9] It is well settled, moreover, that if a scheme to defraud is devised, the fact that there may be no actual misrepresentation of an existing fact is immaterial. *Durland* v. *United States*, 161 U.S. 306, 312–314. It is only necessary to prove that the scheme was one reasonably calculated to deceive and that the mails were used and intended to be used in its execution. *Irwin* v. *United States*, 338 F. 2d 770, 773 (C.A. 9), certiorari denied, 381 U.S. 911; *Lemon* v. *United States*, 278 F. 2d 369, 373 (C.A.

Notwithstanding petitioner's assertions (Pet. 28–30), it was immaterial whether the lots were possibly worth what was paid for them. The statute, 18 U.S.C. 1341, makes it a crime to use the mails in executing a scheme to obtain money or property by false pretenses. It is not an essential element of the offense that the intended victims be actually defrauded or that they should appear to have suffered pecuniary loss. *United States* v. *New South Farm,* 241 U.S. 64; *United States* v. *Hoffa,* 367 F. 2d 698, 707 (C.A. 7), vacated on other grounds, 387 U.S. 231; *Adjmi* v. *United States,* 346 F. 2d 654, 657–658 (C.A. 5), certiorari denied, 382 U.S. 823; *United States* v. *Sylvanus,* 192 F. 2d 96, 106 (C.A. 7), certiorari denied, 342 U.S. 943; *Blue* v. *United States,* 138 F. 2d 351, 359 (C.A. 6), certiorari denied, 322 U.S. 736; *Hass* v. *United States,* 93 F. 2d 427, 432 (C.A. 8); *Cowl* v. *United States,* 35 F. 2d 794, 797 (C.A. 8); *Wine* v. *United States,* 260 Fed. 911, 914 (C.A. 8), certiorari denied, 253 U.S. 484.[10] Nor was it a defense to the

9); *Gregory* v. *United States,* 253 F. 2d 104, 109 (C.A. 5); *Kreuter* v. *United States,* 218 F. 2d 532, 535 (C.A. 5), certiorari denied, 349 U.S. 932.

[10] In *Miller* v. *United States,* 174 Fed. 35 (C.A. 7), cited at Pet. 15–16, 30, the Seventh Circuit held that use of the mails to induce stock purchases, through false and deceitful representations, did not violate the mail fraud statute unless the stock was shown to have had a monetary value less than was paid for it. However, that case arose under the old mail fraud statute (Rev. Stat. § 5480), prior to its amendment in 1909 to embrace schemes to obtain money or property by false pretenses as well as simple schemes "to defraud" (Criminal Code of 1909, § 215, 35 Stat. 1130). Even apart from this distinction, the decision would be irreconcilable with this Court's later decision in *United States* v. *New South Farm, supra,* 241 U.S. 64, and with the Seventh Circuit's own more recent decisions. See *United States* v. *Hoffa, supra,* 367 F. 2d at 707. Petitioner's contention that the

charges, as petitioner argues (Pet. 30), that the company maintained a refund policy, under which a dissatisfied customer could get his money back. While such a policy may be evidence of good faith, it does not necessarily negate a finding of bad faith. See *United States* v. *Sylvanus, supra,* 192 F. 2d at 105. Here the refund offer was limited to 30 days—scarcely time enough to enable many purchasers (particularly those who lived far away, as most did) to make an informed decision in the matter. Moreover, as the court of appeals observed (Pet. App. B. 10), and as the evidence here reflected, disgruntled purchasers are not likely to attempt to take advantage of refund offers; once the fraudulent character of the original transaction has become apparent, the disillusioned purchaser will often not think it worth the effort to press for a refund. This question is appropriately for the trier of fact.

2. Petitioner's claim that relevant evidence was improperly excluded (Pet. 31–44) is also untenable.

a. The trial court excluded proffered exhibits relating to the activities of other private Arizona land developers and similar materials relating to small-tract offerings by the Federal Bureau of Land Management. The rejected exhibits of the private offers con-

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circuits are in conflict on this issue (Pet. 28–29) is based on a *dictum* in *United States* v. *Baren*, 305 F. 2d 527, 528 (C.A. 2), which is repeated in *United States* v. *Rabinowitz*, 327 F. 2d 62, 76 (C.A. 6) (also by way of *dictum*), to the effect that "In every mail fraud case, there must be a scheme to defraud, representations known by defendants to be false and some person or persons must have been defrauded." As we have noted in the text, however, the holdings both of this Court and of the lower courts are clear that proof of financial loss by intended victims of the scheme is unnecessary.

sisted of compendia of advertisements and promotional materials used by other Mohave County real estate subdividers, competitors of petitioner, during the period involved. Petitioner contends that the excluded materials were relevant to the issue of his good faith in that they showed, for example, that although the competing subdivisions had the same checkerboard pattern as did petitioner's, his competitors also had refrained from disclosing this in their advertising; that the competitors had outdone petitioner in the imaginative use of names for their projects; that they had been more flamboyant in the claims made about their properties; etc. (Pet. 34–37). The admission or exclusion of evidence of this general character, for the purposes described, rested within the sound discretion of the court. Cf. *Hofmann* v. *United States*, 353 F. 2d 188, 191 (C.A. 10); *Grell* v. *United States*, 112 F. 2d 861, 875–876 (C.A. 8). If the tendered evidence had been received, as the court of appeals aptly noted (Pet. App. B. 13–14), the government would have been entitled to litigate the deceptive character of the third-party advertising materials. It was reasonable to avoid such collateral inquiries, which would have had the effect of diverting the proceedings into four or five other mail fraud cases. Similarly, with respect to the offerings of the Federal Bureau of Land Management, the government would have been entitled to show that statements in the Bureau's circulars, pointed to by the defense as establishing standards of advertising to which petitioner had in good faith adhered, were so totally unlike the statements of petitioner charged to

be fraudulent that no basis existed for the claim of good-faith reliance. Avoidance of the need for such tangential inquiries was within the court's sound discretion.

b. The court also refused to admit the opinion testimony of a former president of the Arizona League of Land Developers to the effect that petitioner's advertising materials and sales techniques during the relevant period "were well within the range of advertising representations and materials, sales techniques and devices generally and customarily deemed proper during that period, and generally and customarily used during that period by land subdividers who then were and now are considered entirely proper and ethical by the industry itself and the public as a whole" (Pet. 44). As the court of appeals pointed out, however (Pet. App. B. 14), the advertising customs among the land subdividers of the area were immaterial—as were the views of the subdividers as to the ethics of the existing practices. The statutory test was whether there had been a scheme to defraud, and evidence of the practice of the industry would have had no bearing on that inquiry. Moreover, insofar as the rejected testimony sought to give the view of the witness as to the ethics of petitioner's conduct, it was tantamount to an expression of opinion on the ultimate fact in issue—the accused's good faith—and was properly excluded as infringing the province of the fact-finder. Cf. *United States* v. *Press*, 336 F. 2d 1003, 1013 (C.A. 2), certiorari denied, 379 U.S. 965; *United States* v. *Levy*, 138 F. 2d 429, 432–433 (C.A. 7), certi-

orari denied, 321 U.S. 770; *Shreve* v. *United States*, 103 F. 2d 796, 812 (C.A. 9), certiorari denied, 308 U.S. 570.[11]

3. There is no substance to petitioner's contention that the mail fraud statute, as here applied, violated his right of free speech (Pet. 45–47). The contention rests in part on a claim that the allegation of fraud was based on statements taken out of context. However, while the indictment quoted only portions of the advertising brochure, the fact-finder was not thereby invited, as the opinion below points out (Pet. App. B. 12), to consider the statements divorced from their context. Nor did the government rely at the trial on isolated statements in the advertising materials. The government's Exhibit 37 series consisted of six different printings of the brochure, and a copy of each printing was in evidence. The whole document was thus subject to examination by the fact-finder.

Apart from the contention that the fact-finder was asked to consider the quoted statements out of context, the basis of the present claim is that, if the advertising materials be viewed as a whole, no person of "average intelligence" would have been misled. As a factual matter, this contention has been resolved against petitioner by the courts below. Moreover, even if petitioner were correct that, at most, only the "most gullible" persons and those of "substandard intelli-

[11] Since it was immaterial whether the lots were worth what the purchasers had paid for them (p. 10, *supra*), it was not error to exclude the opinion testimony of the witness Smith as to the value of unimproved land in the area (Pet. 32). *A fortiori*, the offer of proof as to the value of land near Kingman, 60 miles away, was properly rejected (Pet. 32).

gence" could have been deceived by his materials (Pet. 46–47), the point would be irrelevant. The mail fraud statute protects "the gullible, the ignorant and the over-credulous as well as the more skeptical". *United States* v. *Sylvanus*, 192 F. 2d 96, 105 (C.A. 7), certiorari denied, 342 U.S. 943; *Lemon* v. *United States*, 278 F. 2d 369, 373 (C.A. 9); *Norman* v. *United States*, 100 F. 2d 905, 907 (C.A. 6), certiorari denied, 306 U.S. 660.[12]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[12] Contrary to petitioner's only remaining contention (Pet. 47–48), the mail fraud statute's proscription of use of the mails in execution of "any scheme or artifice to defraud" is sufficiently plain of meaning to provide an ascertainable standard of guilt. *United States* v. *Attaway*, 211 F. Supp. 682, 685 (W.D. La.); *United States* v. *Gartman*, 145 F. Supp. 420, 421 (E.D. Pa.). See *Durland* v. *United States*, 161 U.S. 306, 312–314. Cf. *Jordan* v. *De George*, 341 U.S. 223, 227–232.

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